Supreme Court, U.S.
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In The
Supreme Court of the United States

JOSEPH BENNARD NICHOLS,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Texas Court Of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

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172 pp

CAPITAL CASE
QUESTIONS PRESENTED FOR REVIEW

In this Texas capital case, the State suppressed material evidence and presented false testimony to the court and jury in an effort to convict two people for firing the same lethal bullet. The Texas Court of Criminal Appeals (in an unpublished, two-page opinion) denied habeas corpus relief as to Petitioner's, Joseph Bennard Nichols, death sentence. Nichols contends that the Texas Court of Criminal Appeals reached this result only by misapplying and misinterpreting this Court's well-established precedent. Specifically, Nichols requests review by this Court of the following questions:

1. Whether the Texas Court of Criminal Appeals committed legal error when it rejected Nichols' *Brady* claim – (a) the State suppressed the location, identity and testimony of one out of two eyewitnesses to the murder, and (b) the State suppressed inconsistencies in the other eyewitness' testimony – on the grounds that the evidence was immaterial.

2. Whether the Texas Court of Criminal Appeals incorrectly applied this Court's well-established federal law regarding the State's presentation of false and misleading evidence by not conducting a harmless-error analysis.

3. Whether it was error for the Texas Court of Criminal Appeals to adopt the district court's conclusion that the undisclosed information could have been obtained by defense counsel's diligence, notwithstanding the fact that there was no reasonable basis for concluding that

CAPITAL CASE
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counsel for Nichols could have discovered the identity, location and testimony of the missing eyewitness prior to or during the trial.

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PETITION FOR A WRIT OF CERTIORARI

Joseph Bennard Nichols requests this Court to issue a writ of certiorari to review the Texas Court of Criminal Appeals' decision.

I.

OPINIONS BELOW

Appendix A is Texas Court of Criminal Appeals' Denial of Petitioner's Application for Writ of Habeas Corpus. Appendix B is Texas Court of Criminal Appeals' Order. Appendix C is the Order on Nichols' Proposed Findings of Fact. Appendix D is the Order on Nichols' Proposed Conclusion of Law and Mixed Questions of Law and Fact. Appendix E is the Order on Respondent's Proposed Findings of Fact and Conclusions of Law.

II.

JURISDICTION

The Texas Court of Criminal Appeals' opinion was rendered on March 12, 2003. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a) allowing review of "final judgments . . . rendered by the highest court of a state in which a decision could be had . . . by writ of certiorari where any . . . right, [or] privilege . . . is claimed under the Constitution."

III.

CONSTITUTIONAL AMENDMENTS

This case involves the following Constitutional Amendments: 1. Sixth calling for all accused persons to obtain "witnesses in his favor;" 2. Eighth requiring that "neither cruel nor unusual punishment be inflicted;" and 3. Fourteenth demanding "no state deprive any person of life, liberty, or property, without due process of law."

IV.

STATEMENT OF THE FACTUAL AND PROCEDURAL BACKGROUND

Joseph Nichols ("Nichols") is not a murderer whose life should be taken. The State knows that Nichols did not fire the single bullet that killed Claude Shaffer, Jr. ("Shaffer") because it previously tried, convicted, and executed the confessed killer, Willie Ray Williams ("Williams") for firing that single bullet.

Nevertheless, in complete defiance of the law and Nichols' due process rights, the State suppressed evidence and lied to the jury to establish Nichols as the triggerman. The State succeeded and Nichols was sentenced to death on March 10, 1982.

A. The Crime.

The undisputed facts are as follows: On October 13, 1980, Nichols and Williams entered Joseph's Delicatessen to commit a robbery. Williams and Nichols pulled guns, shots were fired, and a single shot to his back killed Shaffer. As to the specifics, there are two divergent stories of the crime; one that was set out by the Texas Court of Criminal Appeals in *Williams v. State*, 674 S.W.2d 315 (Tex. Crim. App. 1984), and one put forward by the State in Nichols' second trial ("Nichols II").

According to the *Williams* Court, when Nichols and Williams pulled their guns, Shaffer pulled his gun. *Id.* Surprised by the gun, Nichols fired a shot at Shaffer and Shaffer went down in a "squatting position." *Id.* Nichols ran out the door, but Williams stopped, turned back toward the counter and saw Shaffer squatting with his back towards Williams. *Id.* Williams shot Shaffer in the back, killing him, and returned to steal Shaffer's gun. *Id.* Unable to locate the gun, Williams removed a box containing money and ran. *See id.*

In Nichols II, the State altered the evidence to establish Nichols as the triggerman. The nature of that shift is theory and the evidence against this theory is striking.

B. The Investigation.

There were only five persons inside the store during the crime: Shaffer, Williams, Nichols, and two employees (Cindy Johnson ("Johnson") and Teresa Henry [now Teresa Henry Ishman] ("Ishman")). NFF 1(a) & (d).[1]

1. Nichols' and Williams' Version Of The Events.

The confessions of Williams and Nichols confirmed the story set forth in *Williams*, 674 S.W.2d at 317. The important facts established were Shaffer pulled his gun, and Williams shot and killed Shaffer after Nichols fled. *Id.*; Ex. C.

2. Cindy Johnson's Version Of The Events.

On the day of the murder, the police took Johnson's statement. Johnson claimed that when the two men walked to the counter:

> One of the men pulled a gun . . . Claude reached for his gun and both of the black men shot Claude. Both of the black men started running out of the door before they got any money. One of the black men came back in and grabbed a box that had some change in it and ran back out. When this man ran back in I heard another shot but I did not see him shoot.

Ex. A.

3. Teresa Ishman's Version Of The Events.

Ishman was the other eyewitness, but was subject to a pending arrest warrant and gave the police an alias;

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[1] Nichols' Proposed Findings of Fact ("NFF") are located at App. C; Nichols' Proposed Conclusions of Law and Mixed Questions of Law and Fact ("NCL" – conclusions of law, "NMF" – mixed findings) are located at App. D; Respondent's Findings of Fact and Conclusions of Law ("RFF" – findings of fact, "RCL" – conclusions of law) are located at App. E.

"Teresa McGee." Nonetheless, the State located her on December 30, 1980, and questioned her at the Harris County District Attorney's Office. RFF 68; Ex. B. At the District Attorney's Office, Prosecutor Bob Burdette interviewed Ishman. NFF 3.

During the interview, the State learned Ishman's real name, address, and a crucial fact; Ishman impeaches Johnson's testimony.

> Ishman . . . told A.D.A. Burdette she saw the decedent pull a gun before any defendant fired their weapons . . . the other eyewitness, Ms. Cindy Johnson, could not have seen the fatal shots being fired, because she was hidden in the bathroom when the shooting started, [and] she gave the police a false name because she was subject to an outstanding arrest warrant in Louisiana.

NFF 3.

C. State Proceedings.

1. Williams' Trial; January 29-30, 1981.

Williams pled guilty to murdering Shaffer during the course of a robbery. *Williams*, 674 S.W.2d at 317. The trial court accepted Williams' guilty plea, but required the State to present sufficient evidence. *Id.* During trial, the State offered Williams' confession that he shot Shaffer:

> Joe fired one shot and the old man went down like he was squatin [sic] down and hadn't [sic] been hit. Joe was already out the door and I had the gun still pointed back toward the old man. I thought he was coming up on me and I just fired.

Ex. C. The State bolstered Williams' confession with forensic evidence proving Williams fired the fatal bullet. The evidence overwhelmingly established that Williams shot Shaffer, at close range, in the back.

The Texas Court of Criminal Appeals accepted the State's evidence, affirming the conviction and death sentence. *Williams*, 674 S.W.3d at 317. On January 30, 1995,

Willie Ray Williams was executed for Shaffer's murder. NFF 8.

2. The State Extradites Ishman.

In March of 1981, the State, acting through the Harris County Sheriff's Department, arrested Ishman on her Louisiana arrest warrant. NFF 9. On March 28, 1981, Ishman was released to Louisiana police officers and brought to that State. *Id.* During Nichols' trials, there was "no dispute that the State knew the witness' true name was Teresa Henry, that she had been arrested and delivered to Bogalusa, Louisiana, and that she was living in Bogalusa, Louisiana." NMF 1(a).

Of course, this was never revealed to defense counsel. NMF 1, 2, 4.

3. Nichols' First Trial; July 16-31, 1981.

Six months after Williams' conviction, Nichols was tried as a party to Williams' capital offense.

a. The State's *Brady* disclosures.

On May 9, 1981, two months after Ishman was extradited to Louisiana, Nichols moved for discovery, requesting:

> A list of names and addresses of witnesses known to the State who have knowledge of the facts of the present cause . . . any evidence or information in the possession or control of the State of Texas or known to the agents of the State which is inconsistent with the guilt of the Defendant, or which might tend to ameliorate the punishment of the Defendant in the event of a finding of guilt.

NFF 10.

On June 4, 1981, in response to Nichols' request, the State informed the defense that it did not oppose its discovery request. NFF 12(a). The State attempted to respond to the request by tendering its file in the Nichols matter, but the file did not contain any information about Ishman or

her previous statements to Prosecutors. NFF 12. The State further "represented that it would fulfill its *Brady* obligations through its subpoena list." NFF 14(a). However, the subpoena list identified Ishman as "McGee." NFF 16. On June 22, 1981, Prosecutor Jones agreed that if something new is discovered "I will be happy to give a copy to the defense." NFF 14(a). On July 7, 1981, Prosecutor Jones agreed to disclose all witnesses in subpoena form, still claiming *no new witnesses exist*. NFF 15. At this point, the subpoena list still identified Ishman as "McGee." NFF 16.

Not surprisingly, at the start of Nichols' first trial ("Nichols I"), July 16, 1981, the defense was unable to locate "McGee." NFF 17. Nichols' motion for attachment based on the materiality of the missing witness was granted; however, the court denied his motion for continuance. NFF 18(b) & 19.

b. The State's trial strategy.

The State's trial strategy in Nichols I was based on the law of parties. It was the State's contention that Nichols was a party to the conspiracy and equally guilty of Shaffer's murder. During Nichols I, the State elicited Williams' testimony establishing that Nichols did ***not*** shoot Shaffer.[2]

Nichols' defense was abandonment; he abandoned the crime when he ran, before Williams decided to murder. NFF 24. Additionally, Nichols argued that Williams' action was an independent impulse aimed at obtaining Shaffer's gun and was not part of the original conspiracy to rob. NFF 24(a). Nichols' defense was consistent with the prosecution and death sentence imposed on Williams. NFF 24(d).

The State refuted Nichols' theory by presenting the testimony of Johnson, the only eyewitness known to the defense. NFF 24. The State argued that Nichols' defense

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[2] Q: "Do you know whether or not [Shaffer] was hit [with Nichols' bullet]" A: "No, sir, he wasn't hit." Ex. I at App. 128.

was flawed since Williams did not know about Shaffer's gun and according to the only eyewitness, Johnson, Shaffer never pulled a gun. The State urged the jury to focus on:

> [T]estimony of Cindy Johnson . . . Cindy Johnson is saying, no, he never had that gun . . . Cindy Johnson from the very beginning of that robbery told you that the complainant was shot in the first instance, and he went down [and Shaffer] did not have a gun in his hands . . . Look at Cindy Johnson. . . . She told you Mr. Shaffer did not have a gun.

NFF 27(a)-(c).

c. The mistrial.

During the punishment phase of Nichols I, the State again relied heavily on Johnson's testimony. The State urged the jury to "look at what Cindy Johnson said. Claude Shaffer, Jr. never touched that gun. There was no provocation." NFF 29. Still, the jury deadlocked on punishment issues and a mistrial was declared on July 31, 1981. NFF 30.

After the mistrial, Prosecutor Jones interviewed jurors to find a reason for the deadlock. The jurors were reluctant to impose the death penalty against Nichols because he did not murder Shaffer. *Nichols v. Collins*, 802 F. Supp. 66, 74 (S.D. Tex. 1992), *overruled, Nichols v. Scott*, 69 F.3d 1255 (5th Cir. 1995). Due to juror response, Prosecutor Jones decided to change his strategy for Nichols II.

4. Nichols II; February 16 – March 10, 1982.

Nichols was tried for capital murder a second time during February and March of 1982.

a. The repeated requests for Ishman.

Prior to voir dire, Nichols inquired about the State's witnesses. The State again said it was relying on the previous subpoena list, which identified Ishman as "McGee" living in Houston. NFF 32. On January 11, 1982, due to the

inability to locate (McGee), defense requested all motions presented during the previous trial, including the motion for attachment, be made part of the record for the second trial. Ex. J at App. 130. The court granted this request and made the same rulings as in Nichols I.[3] *Id.*

b. The State locates Ishman again.

Voir dire began on January 11 and concluded on February 15, 1982. NFF 33. Prior to the conclusion of voir dire, the State located Ishman, confirming that she was in Louisiana. NFF 34. Despite this knowledge, the State reissued the subpoena list from Nichols I identifying Ishman as "McGee" and showing a Houston address. NFF 35. Still missing one out of two eyewitnesses, both sides announced they were ready for trial on February 16, 1982. NFF 36.

c. The State's theory.

Based on the importance of the triggerman issue, the State abandoned the strategy employed in two prior trials, that Williams fired the fatal bullet. This strategic change was not the result of further investigation or additional fact-finding,[4] the State changed its strategy by suppressing evidence, pressuring witnesses to lie, and claiming that Nichols killed Shaffer, in spite of a previous judicial determination to the contrary.

According to the State's new version of the crime, Nichols turned and shot Shaffer in the back. "Willie could not have shot [Shaffer] . . . [Nichols] fired the fatal bullet and killed the man in cold blood and he should answer for that." Ex. G at App. 121. To present such a theory, the State

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[3] Amazingly, the state habeas court found that the defense did *not* make "a request for a writ of attachment for the witness Theresa McGee like they did in the first trial." NFF 36(a).

[4] During the federal habeas proceeding, Jones admitted that no additional investigation was made after Nichols I.

relied almost exclusively on Johnson's testimony; the only eyewitness revealed to the defense. NFF 37 & 41.

The defense remained consistent; Williams killed Shaffer as a result of an independent impulse and Nichols abandoned the crime prior to the murder. The defense argued that Williams went back inside the delicatessen, after the robbery terminated, and murdered Shaffer. NFF 42(a). The defense maintained that the murder was committed by "Williams who went into the store . . . to get the gun and he shot the man." NFF 42(c)(ii).[5]

The State countered, relying on Johnson's testimony to prove that Nichols, not Williams, fired the fatal shot. NFF 37, 41, & 42(d). The State argued:

> [Nichols] is a killer. That man sat right where you're sitting and he pointed a gun and he fired it. That bullet went into the back of this man's back and blew him over in a pool of blood. And I'll tell you that it was [Nichols'] hand that did the killing. How do you know that? Cindy saw it. She told you.

NFF 42(d)(i). Additionally, in order to rebut Nichols' independent impulse theory, the State continued to rely on Johnson's testimony regarding Shaffer's gun:

> In [Johnson's] testimony on the stand she said Mr. Shaffer did not have a gun. The evidence is he did not have a gun. It's right here. You can have it read to you. You can read it to yourselves aloud. That's why I offered it That's what this trial is all about. [Johnson] told you Mr. Shaffer did not have a gun.

NFF 42(d)(i)-(iii). Additionally, Johnson's testimony was critical during punishment. NFF 46. In closing, Prosecutor Jones argued that Nichols was unprovoked and Shaffer did not have a gun. *Id.*

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[5] In Nichols' Proposed Findings of Fact, counsel inadvertently made two 42(c) findings of fact. The second 42(c) will be referred to as 42(d).

Not content with suppressing material evidence and lying to the jury, Prosecutor Jones also felt compelled to attack defense counsel. He argued the defense, not the State, was guilty of "shifting gears" and attempting to show the bullet was from Williams, not Nichols. "Aren't you offended by that? Wouldn't you be offended for a State's attorney to stand up here and shift and twist and blatantly change the proof around? There is something very wrong with that. I submit to you that you should be offended by that." Ex. H at App. 124.

On February 23, 1982, the jury began deliberations, which clearly focused on Johnson's testimony and the defense's independent impulse argument. NFF 44. Johnson's testimony was critical to the jury's deliberation on Nichols' guilt and innocence. The jury requested all "Johnson testimony starting with when gun was pulled." NFF 44(b). Following further instruction, the jury again requested "Johnson's description of the shooting." NFF 44(c).

On February 24, 1982, the jury accepted the State's manipulated theory and Johnson's inconsistent testimony. The jury answered the three special issues affirmatively and convicted Nichols of murdering Shaffer. On March 10, 1982, the trial court assessed punishment at death by lethal injection. On April 13, 1988, the Texas Court of Criminal Appeals affirmed the conviction and sentence. *Nichols v. State*, 754 S.W.2d 185 (Tex. Crim. App. 1988), *cert. denied*, 488 U.S. 1019 (1989).

D. Nichols' First Habeas Corpus Proceeding.

Following his direct appeal, Nichols initiated state habeas corpus proceedings. The trial court held an evidentiary hearing on two issues: (1) ineffective assistance of counsel; and (2) statistical challenge to the Texas death penalty statute. On December 12, 1991, the Texas Court of Criminal Appeals, without opinion and with two Judges dissenting, denied habeas corpus relief.

Nichols then instituted federal habeas proceedings. A mere four days before Nichols' scheduled execution date, Judge David Hittner granted a stay of execution and an

evidentiary hearing. To prepare for the evidentiary hearing, Judge Hittner allowed discovery of the State's files. There was notable resistance by the State to production of its records, which occurred only with direct court intervention.[6] The reason for the resistance suddenly became clear.

The documents produced revealed a myriad of suppressed evidence, which effectuated the State's strategic shift. The files from Williams' trial and conviction revealed that the State found and questioned Ishman two months following the crime. NFF 3. The documents also revealed that prior to Nichols II the State located Ishman in Louisiana. NFF 34.

Judge Hittner expressly preserved Nichols' *Brady* claim for state court review. *Nichols,* 802 F. Supp. at 79.

E. This Habeas Corpus Proceeding.

On April 16, 1997, the Texas Court of Criminal Appeals held that Nichols' application could proceed as to the *Brady* claim: did the State suppress material and exculpatory evidence specifically the name and location of Ishman. App. B. The district court has answered this issue affirmatively.

The district court found the following with respect to the suppressed evidence:

- The State knew Ishman's true name and location. NMF 1.

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[6] Judge Hittner expressed his impatience with the State for not turning over potentially exculpatory evidence.

> [Y]ou call over there at that DA's office and get the whole file here, and I want to know also, I want the key man or woman who, in effect, said they turned over everything. Apparently there is [sic] stacks of things weren't copied and so forth, and we just can't spin our wheels here in federal court. We are already to go.

Ex. K at App. 133.

- There is not a single mention of the name Teresa Henry in the public records. NFF 2(b).
- Every mention of the witness' name in the pleadings, transcripts, and subpoenas is of "McGee." NFF 2(b).
- The State did not disclose the true name and location of Ishman. NMF 4.
- The State failed to fulfill its promise to provide any new information. NMF 6.
- The State agreed to disclose the names and addresses of all witnesses known to the State. NFF 12.
- The file supplied for defense counsel's review did not contain Ishman's true name, location, or social security number. NFF 12(e).
- By February 15, 1982, the District Attorney's Office once again located Ishman. NFF 34.
- The State reissued the identical subpoena list as in Nichols' first trial, which incorrectly identified "McGee" and provided an incorrect address. NFF 35.
- On at least three separate occasions prior to Nichols' conviction, the State located Ishman: A.D.A. Burdette interviewed her; the Harris County Sheriff's Department arrested and extradited her, and A.D.A. Jones' investigator located her in Bogalusa. NMF 1(b).
- The State knew that "McGee" could not be served with a subpoena at the address listed. NMF 2.
- The State knew the substance of Ishman's testimony. NMF 3.
- Ishman's testimony is material. NMF 8(c).
- The State did not correct knowingly false testimony. NMF 9.
- The state knew the actual name of the witness was Ishman and the name and address on the subpoena list was inaccurate. NMF 9.

Nichols presented the state habeas court with an affidavit from Johnson casting serious doubt on her testimony and Prosecutor Jones' motives. Johnson claimed that when Nichols and Williams pulled their guns, "Shaeffer [sic] squatted down behind the cash register. It looked like he was going for his gun." Ex. E. Johnson hid in the restroom after Williams and Nichols left. *Id.* While in the restroom, she "heard someone come back into the store and then immediately leave again after firing another shot." *Id.* When Johnson asked Prosecutor Jones if she could "add these things to [her] original statement," he refused, warning her not to talk to the defense. *Id.*

The hearing concluded on September 24, 1997 and, three years later, the district court issued its findings and conclusions on April 9, 2001. Amazingly, after making the preceding findings of fact, the district court still denied Nichols habeas relief, claiming Nichols failed to show "materiality." RCL at 2 & 3. The district court believed that "a significant portion of [Ishman's] testimony would have been subject to substantial impeachment if presented at trial" and "evidence contradicts Ishman's assertion[s]." RFF 116 & 117.

The district court also held that Johnson's 1992 affidavit did not show "a probability of a different result sufficient to undermine confidence in the outcome." RFF 115. Even though the district court found that the State failed to correct knowingly false information (NMF 9), the court determined that the State need not prove the false information resulted in harmless error. NCL 8. Finally, the district court concluded that the applicant failed to show that undisclosed information could not have been obtained by defense's due diligence. RCL 4.

The Court of Criminal Appeals affirmed the district court's decision in an unpublished, two-page opinion. Ex. A. Even though the district court clearly held that Ishman's testimony was material (NMF 8), the Court of Criminal Appeals found that Nichols "fail[ed] to show materiality . . . [and] that any undisclosed information, is material when

evaluated in light of the entire record." *Id.* The Court of Criminal Appeals failed to elaborate on the district court's additional erroneous conclusions.

V.

WHY REVIEW SHOULD BE GRANTED

Any constitutional error in the state-court proceedings that "undermine[s] the confidence in the fundamental fairness of the state adjudication certainly justif[ies] the issuance of the federal [habeas] writ." *Williams v. Taylor*, 529 U.S. 362, 375 (2000). The suppression of material evidence favorable to an accused is recognized by *Brady v. Maryland* as such an error requiring the issuance of habeas relief. *See id.*; *Brady v. Maryland*, 373 U.S. 83, 87 (1963).[7]

This case warrants review for a number of substantial reasons. First, Nichols established a true *Brady* violation: (1) the State knowingly suppressed favorable exculpatory and impeachment evidence; and (2) such evidence was material as evidenced by the mistrial in Nichols' I and juror requests in Nichols II. This case is contrary to *Brady* precedent and denial of relief sets the stage for numerous repeats.

Second, the State presented knowingly false information to the defense, the court, and the jury by: (1) continuing to call Ishman "McGee;" (2) allowing Johnson's false testimony to remain uncorrected; and (3) claiming that Nichols was the triggerman when the State knew Williams murdered Shaffer. When false evidence corrupts the truth-seeking function reversal is warranted unless it results in harmless error. However, a harmless-error analysis was not conducted. Due to the court's failure to conduct a harmless-error analysis, the lower courts misapplied well-settled

[7] The factual scenario in Nichols' case is similar to the situation before this Court in *Banks v. Cockrell*, (No. 02-8286), and allows this Court to further clarify *Brady* requirements to lower courts (Texas specifically).

federal law. The dangerous precedent set by the Texas Court of Criminal Appeals warrants this Court's review.

Third, the conclusion that undisclosed information could have been obtained by defense counsel's diligence was erroneous. During trial, the State repeatedly assured defense counsel that any new information would be disclosed without the need for additional requests. The conclusion that defense counsel could have discovered the material evidence is contrary to this Court's well-established law. Due to the precarious precedent set by this decision, this Court should grant review to correct the erroneous application of federal law.

VI.

ARGUMENT

A. Texas Court Of Criminal Appeals' Denial Of Habeas Relief Is Contrary To This Court's Clearly Established *Brady* Precedent.

In *Brady*, this Court determined "suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. This Court has since held the duty to disclose evidence is applicable even if there is no request, or just a general request, by the accused. *United States v. Agurs*, 427 U.S. 97, 103-08 (1976). The State's duty to disclose has broadened to encompass impeachment evidence, *United States v. Bagley*, 473 U.S. 667, 676 (1985), and information only known "to police investigators and not to the prosecutor." *Kyles v. Whitley*, 514 U.S. 419, 438 (1995).

Under *Brady* and its progeny, a proceeding is rendered fundamentally unfair if the: 1. prosecution suppressed favorable evidence; and 2. evidence was material to either the guilt or punishment. *Brady*, 373 U.S. at 87; *Kyles*, 514 U.S. at 433-34; *Bagley*, 473 U.S. at 683. The *Kyles* decision clarifies four significant aspects of materiality. First, the applicant is not required to demonstrate by a

"preponderance of the evidence" that the suppressed evidence would have ultimately resulted in an acquittal or a life sentence; rather the inquiry is whether the suppressed evidence undermines confidence in the jury's decision. *Kyles*, 514 U.S. at 434. Second, materiality "is not a sufficiency of the evidence test." *Id.* A defendant need only prove "that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435; *Lindsey v. King*, 769 F.2d 1034, 1042 (5th Cir. 1985) (suppressed impeachment evidence may have consequences for the case far beyond discrediting the witness's testimony). Third, a harmless-error analysis is not applicable to *Brady* violations. *Kyles*, 514 U.S. at 435. Finally, materiality must be assessed "in terms of the suppressed evidence considered collectively, not item by item." *Id.* at 436.

In *Kyles*, this Court found the trial was fundamentally unfair because favorable impeachment evidence was suppressed. *Id.* at 454. Similarly, in Nichols' case, the prosecution suppressed favorable exculpatory and impeachment evidence. The materiality of the suppressed evidence was demonstrated by the mistrial that occurred in Nichols I and the juror requests in Nichols II.

1. The prosecution suppressed favorable evidence.

In Nichols I, the jury deadlocked on punishment issues and a mistrial was declared. The jury was reluctant to impose a death sentence against Nichols because he did not kill Shaffer. NFF 30; *Nichols*, 802 F. Supp. at 74. During Nichols II, the State switched its theory in an attempt to prove that Nichols fired the fatal bullet, not Williams, and convict two men for the same murder.

By suppressing the evidence, the State was successful in obtaining a death penalty conviction in Nichols II for the same crime that killed Williams. However, during federal habeas review, Nichols learned of material evidence the State hid to effectuate the change in trial strategy.

Similarly, in *Kyles*, Kyles' first trial ended in a hung jury. 513 U.S. at 429-431. Kyles was tried again, convicted of first-degree murder, and sentenced to death. *Id.* On habeas review, previously undisclosed evidence was uncovered, such as: (1) contradictory statements made by two eyewitnesses; and (2) inconsistent testimony from the police informant. *Id.* The net effect of the cumulative evidence withheld in *Kyles* raised a reasonable probability that its disclosure would have produced a different result and a new trial was warranted. *Id.* at 422.

a. The State's failure to reveal impeachment evidence.

In *Kyles*, like this case, during habeas review it was revealed that the state failed to disclose contradictory testimony of two eyewitnesses to the murder. One eyewitness testified that he had seen Kyles shoot the victim. *Id.* at 441. However, at the scene of the murder he told the police the assailant was "a black male, about 19 or 20 years old, about 5'4" or 5'5", 140 to 150 pounds, medium build." *Id.* This description was entirely inconsistent with Kyles, who is six-feet tall and thin. *Id.* The second eyewitness testified that he saw Kyles struggle with, and shoot, the victim. *Id.* However, at the scene of the murder the witness testified that he had not seen the actual murder. *Id.* This evidence "would have fueled a withering cross-examination, destroying confidence in [the witness'] story and raising a substantial implication that the prosecutor had coached him to give it." *Id.* Disclosure of prior statements would have resulted in a "markedly weaker case for the prosecution and a markedly stronger one for the defense." *Id.*

The *Kyles* Court concluded not disclosing impeachment evidence that casts doubt on the reliability of an eyewitness is grounds for a new trial. *Id.* at 444. Due to the suppressed impeachment statements, confidence in the outcome of Kyles' trial was seriously undermined and habeas relief was granted.

i. The critical nature of Johnson's trial testimony.

In Nichols' second trial, the defense continued to rely on the theory that Williams killed on an independent impulse; Williams went back in the store to get Shaffer's gun and then murdered Shaffer. NFF 42(a) & (c). Like *Kyles*, in order to rebut this defense during the guilt/ nnocence phase of the trial, the State relied exclusively on eyewitness testimony claiming that "Shaffer did not have a gun. The evidence is he did not have a gun." NFF 42(d) & d(i).

Johnson's eyewitness testimony also provided critical testimony during punishment. NFF 46. Relying on Johnson's testimony that Shaffer did not pull a gun, Prosecutor Jones argued that Nichols was unprovoked when he shot and killed Shaffer. NFF 46(b). The importance of Johnson's testimony in both the guilt/innocence and punishment phases of the trial is evidenced by juror requests for all "Johnson testimony starting with when the gun was pulled" and Johnson's "description of the shooting." NFF 44(b) & (c).

ii. The critical nature of the undisclosed testimony

At the scene of the crime, Johnson's testimony regarding Shaffer's gun was inconsistent with that provided at trial. On the day of the murder, Johnson testified that "[o]ne of the men pulled a gun . . . Claude reached for his gun and both of the black men shot Claude." Ex. A. During Nichols II, Johnson testified that Shaffer did not reach for a gun and her original statement was a mistake. RFF 27. The miraculous evolution of Johnson's eyewitness description would have been seriously undermined if Ishman's suppressed statements had been introduced.

Ishman told Prosecutor Burdette that Shaffer pulled a "gun before any defendant fired their weapons." NFF 3. Ishman's version of events is consistent with Johnson's original statement. Ex. A. However, the defense was never

provided with Ishman's testimony. The evolution of a description "can be fatal to [the eyewitness'] reliability" and the change in Johnson's story would have been "seriously undermined" if the jury were allowed to consider Ishman's contradictory statements. *See Kyles*, 514 U.S. at 444. Allowing Ishman's testimony "would have fueled a withering cross-examination, destroying confidence in [Johnson's] story and raising a substantial implication that the prosecutor had coached [her] to give it." *See id.* at 441.

The effective impeachment of one eyewitness is sufficient to establish the need for a new trial. *Id.* at 445 (citing *Agurs*, 427 U.S. at 112-113 n.21 (requiring habeas relief when one, out of two, eyewitness impeaches the testimony of the other eyewitness)). There is no doubt that Ishman's statements impeach Johnson's testimony and credibility. Disclosure of Ishman's statements would have resulted in a "markedly weaker case for the prosecution and a markedly stronger one for the defense." *See id.* at 441. This Court should grant review to correct a misapplication of this Court's previous *Brady* determinations.

b. The State's failure to reveal changes in Johnson's testimony.

In *Kyles*, damage to the state's case was not confined to various eyewitness statements, undisclosed statements made by the police informant raised additional concerns. *Id.* at 445. The informant's statements to the police were "replete with inconsistencies," but the defense was never provided with the inconsistent statements. *Id.* As a result, the defense was unable to question the informant about the variations in his story. *Id.* If the defense would have obtained the inconsistent statements, it could have argued that the investigators and the prosecutor wanted to see Kyles arrested for the murder. *Id.* at 447; *Lindsey*, 769 F.2d at 1042 (awarding a new trial because the withheld *Brady* evidence carried with it the potential for discrediting the methods employed in assembling the case).

In Nichols II, damage to the State's case was not confined to the suppression of Ishman's identity and

contradictory statements, inconsistent statements were given by Johnson that further undermines confidence in the trial. Shortly after the murder, Johnson spoke with Prosecutor Jones about the murder and told him the following:

> When the men pulled their guns . . . Shaeffer [sic] squatted down behind the cash register. It looked like he was going for his gun. [Williams] . . . said something like "don't go for the gun" when he squatted down. . . . After they left, I hid in the restroom, and while I was in there I heard someone come back into the store and then immediately leave again after firing another shot . . . I asked if I could add these things to my original statement, but [Prosecutor] Ira Jones never allowed me to do that.

Ex. E.

The State never provided this information to the defense; the state actually coerced Johnson into concealing this information. Johnson testified that "before the second trial, the defense lawyers approached me asking if they could talk to me. . . . I was instructed to answer the defense lawyers' questions regarding the money box that was taken during the robbery, and not to discuss anything else." *Id.* If the defense had been provided with this information it would have bolstered the argument that Prosecutor Jones wanted to see Nichols receive the death penalty for Shaffer's murder.

If the State had provided the defense with the change in Johnson's version of the events, the defense could have impeached her testimony with its inconsistencies. Cumulatively, the State's change in trial strategy, Ishman's testimony, and Johnson's inconsistent statements, would have resulted in a markedly weaker case for the prosecution.

The State's failure to provide the defense with such substantive changes in Johnson's story casts further doubt on Nichols' conviction. The district court erroneously concluded that Johnson's statements did not show "a probability of a different result sufficient to undermine

confidence in the outcome." RFF at 115. However, such a conclusion mistakenly relies on her change in testimony alone. It is the "cumulative effect of the suppressed evidence" that undermines the confidence in the trial's outcome. *Kyles*, 514 U.S. at 447. According to this Court's precedent, if the defense had been privy to the inconsistent statements made by Johnson, it would have caused additional concern in the verdict.

The Texas Court of Criminal Appeals' denial of relief is contrary with this Court's *Brady* determinations. Additionally, this case warrants review to further clarify lower courts' understanding of *Brady*'s disclosure requirements.[8]

2. The suppressed evidence was material.

Materiality is evidenced by the "cumulative effect of suppression" and "leaves the government with a degree of discretion." *Kyles*, 514 U.S. at 437. However, this "degree of discretion" imposes a corresponding burden on the state to show the unknown evidence "does not amount to a *Brady* violation." *Id.* It is the state's responsibility to disclose known, favorable evidence "rising to a material level of importance," this duty is "inescapable." *Id.* at 437-38.

When the state suppresses material evidence and such evidence undermines the confidence in the jury's verdict, a due process violation has occurred. In reviewing a *Brady* claim, the ultimate question is "not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict would have been the same." *Id.* at 453. On granting relief in *Kyles*, this Court held that confidence in the jury's verdict could not "survive a recap of

[8] This Court recently granted review on a similar factual scenario in *Banks v. Cockrell*, No. 02-8286. In *Banks*, this Court will review whether Texas prosecutors suppressed material evidence by hiding the informant and withholding his paid status.

the suppressed evidence and its significance for the prosecution." *Id.*

During both phases of Nichols II, Johnson was the star witness and her testimony was uniquely damaging. During the guilt/innocence phase of the trial, the State argued that Nichols fired the fatal shot. In order to prove this assertion, the State relied on "Johnson's testimony almost exclusively." NFF 42(d). Johnson testified that Nichols fired the bullet that went into Shaffer's back and the jury was explicitly urged to rely on her testimony. NFF 42(d)(i) & (ii).

Ishman's statements would have seriously undermined Johnson's testimony. Ishman claims that Johnson could not have seen Nichols point the gun and fire it "into the back of this man's back [that] blew him over in a pool of blood" because Johnson was locked in the bathroom. NFF 42(d)(i). Additionally, Ishman's testimony would have further bolstered Johnson's admission at the scene of the crime that "[w]hen this man ran back in I heard another shot *but I did not see him shoot*" and her 1992 Affidavit proclaiming that she "hid in the restroom" when someone came back into the store and fired another shot. Ex. A & E. Disregarding the substantive questions that Ishman's testimony raises, her impeachment testimony alone warrants habeas relief. This Court's settled precedent demands a new trial when undisclosed *Brady* evidence allows the defense to "effective[ly] impeach . . . one eyewitness." *See Kyles*, 514 U.S. at 445 (citing *Agurs*, 427 U.S. at 112-113 n.21.

It is obvious that confidence in the jury's verdict cannot "survive a recap of the suppressed evidence and its significance for the prosecution." *See id.* Like *Kyles*, the cumulative effect of the undisclosed information is overwhelming. The State failed to reveal: 1. Ishman's true identity; 2. Ishman's statements; 3. substantive changes to Johnson's statements. The materiality of the suppressed evidence is obvious by the mistrial in Nichols I and juror requests in Nichols II. NFF 44(a), (b), & (c).

This Court should grant review to provide much needed guidance to Texas courts regarding the disclosure of material evidence.

B. The Texas Court Of Criminal Appeals Unreasonably Applied Clearly Established Federal Law.

In *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), this Court held that the knowing use of false testimony is "a deliberate deception of the court and jury, and violates a defendant's due process rights." In *Napue v. Illinois*, 360 U.S. 264 (1959), this Court condemned the State's knowing use of perjured testimony as a violation of the Fourteenth Amendment. Prosecutors have a constitutional obligation to correct perjured testimony. *Giglio v. United States*, 405 U.S. 150 (1972). "[U]nder the Constitution, the defendant is entitled to a jury that is not laboring under a Government-sanctioned false impression of material evidence when it decides the question of guilt or innocence with all its ramifications." *United States v. Barham*, 595 F.2d 231, 242 (5th Cir. 1979).

A petitioner is entitled to relief if: (1) the testimony was false; (2) the State knew the testimony was false; and, (3) "there is any reasonable likelihood that the false testimony could have affected the jury's verdict." *Napue*, 360 U.S. at 269-72. The knowing use of false testimony renders the result of a proceeding "fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony *could* have affected the judgment of the jury." *United States v. Bagley*, 473 U.S. at 679.

In Nichols II, Prosecutor Jones was only interested in seeing Nichols receive a death sentence conviction, as evidenced by the great lengths he went to conceal material information and false evidence presented to the jury, court, and defense.[9] Prosecutor Jones allowed false testimony to taint the jury panel throughout Nichols' trial and he failed

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[9] Prosecutor Jones' hunger for the death penalty in this action was further evidenced by the small, perfectly hand-drawn, syringes he placed on juror information sheets, some inscribed with Nichols' nickname; "JoJo." *See example* at Ex. F.

to correct the false impression that it left. There is no doubt that the presentation of this false information affected the jury's verdict as evidenced by the mistrial in Nichols I and juror requests in Nichols II.

Although the district court found that the State failed to correct knowingly false information (NMF 9), the court denied that the false testimony was presumptively material unless the nondisclosure was harmless error. NCL 8. By adopting this conclusion of law, the Texas Court of Criminal Appeals' decision was an unreasonable application of clearly established federal law, which will set a damaging precedent if allowed to go uncorrected.

1. The State's presentation of knowingly false information.

a. Ishman's testimony, name, and location.

The State's presentation of evidence was known to be false and created a false impression affecting the jury's judgment in the case. *See* NMF 9. When the State proffered its subpoena list, it listed the eyewitness as "McGee" when it admittedly knew that her name was Ishman. The state continued to allege that it could not locate "McGee," after the State knowingly extradited her to Louisiana. *See* NFF 32 & 35.

Even during Nichols' trial, Prosecutor Jones made false statements to the jury by claiming that Johnson "ran to the back and stood back there with another woman that was back there, Teresa McGee." NFF 42(d)(ii). Unbeknownst to the defense, the court, and jury, the State did know what her name was; it was Ishman. More importantly, the State knew the substance of Ishman's testimony and that it contradicted the State's case.

b. Johnson's false testimony.

When Johnson took the stand, the prosecution was well aware of her prior inconsistent statements given at the scene. Yet the prosecution said absolutely nothing when her testimony differed substantially from her original

statement. In fact, the prosecution elicited what it knew to be false statements from Johnson.

Johnson's story changed dramatically from the scene of the crime to the second trial. At the scene of the crime, Johnson told the police when "Shaffer reached for his gun [] both of the black men shot." Ex. A. However, at trial she recanted her statement claiming Shaffer did not have a gun. Johnson also admitted to investigators "one of the black men came back in and grabbed a box that had some money in it and ran back out. When this man ran back in I heard another shot but I did not see him shoot." *See id.* However, at trial Johnson claims she saw Nichols shoot Shaffer.

The major change in Johnson's story was a result of Prosecutor Jones' strong coaching. Ex. E. Prosecutor Jones knew the information provided was false and he failed to correct the misperception, allowing the perjured testimony to stand uncorrected.

c. Nichols as the triggerman.

The State continued to present knowingly false evidence; Nichols was the triggerman. However, the State already condemned one man to death for the same crime. "[F]or a sovereign state ... to take flatly inconsistent position in two different cases ... surely raises question of prosecutorial misconduct." *Jacobs v. Scott*, 513 U.S. 1067 (1995) (Stevens, J. dissenting).

A similar scenario was raised in *Drake v. Kemp*, where Drake and Campbell were both indicted for capital murder and tried separately. 762 F.2d 1449 (7th Cir. 1985). In the first trial, the prosecutor secured the death penalty by arguing that Campbell, not Drake, was the murderer. *Id.* at 1470-72. In the second trial, the prosecutor secured the death penalty by arguing that Drake, not Campbell, was the murderer. *Id.* at 1479 (Clark, J. concurring). The Eleventh Circuit found such action to be egregious and fundamental error. The State cannot "divide and conquer in this manner. Such actions reduce criminal trials to

gamesmanship and robs them of their supposed purpose of a search for truth." *Id.*

Likewise, the State is precluded from contradicting the factual resolution in the Williams' trial; Williams fired the fatal shot. Once this judicial determination was made, Nichols could not be convicted as the murderer. The distinction is demonstrated by the jury's inability to impose a death sentence in Nichols I and Prosecutor Jones' change in trial tactics in Nichols II.

> The State argued, the jury found, and the court accepted the determination in the Williams trial that Williams was the triggerman, not just a party to the offense. That fact was established as the truth. This court has concluded that the prosecutor in charge of Nichols II offered evidence and argued to the jury and court that Nichols was the triggerman. By prior judicial determination, the evidence submitted was necessarily false. Accordingly, this Court finds that the prosecutor in charge of Nichols II knowingly used false evidence to obtain the conviction and sentence in Nichols II.

Nichols v. Collins, 802 F. Supp. at 75.

2. The State failed to demonstrate harmless error.

The burden to establish the effect of false testimony is more favorable to a petitioner than the *Brady* materiality standard since "the knowing use of perjured testimony involves prosecutorial misconduct and, more importantly, involves a corruption of the truth-seeking function of the trial process." *Bagley*, 473 U.S. at 681. Even if there is sufficient evidence in the case to support a guilty verdict, the jury, not judge, is given the constitutional responsibility to decide guilt or innocence. *Barham*, 595 F.2d at 242. The standard is equivalent to the harmless-error standard of *Chapman v. California*, 386 U.S. 18 (1967), which requires the State "to prove beyond a reasonable doubt that the error

complained of did not contribute to the verdict obtained." *Bagley*, 473 U.S. at 679 n.9.

If this Court allowed any lesser standard, it would promote the knowing presentment of perjured testimony until a conviction is finalized. *See Napue*, 360 U.S. at 269. A state could knowingly present perjured testimony and then rest on its laurels, making the defendant prove that the error was not harmless. Such a standard would promote, rather than inhibit, prosecutorial misconduct in death penalty cases where the "duty to search for constitutional error with painstaking care is never more exacting." *Kyles*, 514 U.S. at 422.

Prosecutor Jones knowingly presented false testimony regarding Ishman's name and whereabouts, Johnson's false testimony, and Nichols' triggerman status. When this error was presented, the State did not show that this error was "harmless." As a matter of fact, the State failed to respond to the allegations at all.[10] The State should not, by failing in its duty to correct false testimony, be able to shift the burden to the defense to discover the misrepresentation and prove its harmful effect.

The Texas Court of Criminal Appeals' ruling sets a dangerous precedent by providing the prosecution with an incentive to present knowingly false information to the jury and conceal *Brady* documents until after the conviction is finalized. This Court should grant review since the Texas Court of Criminal Appeals' decision is contrary to this Court's "harmless-error" jurisprudence and allowing this determination to stand would create a treacherous precedent.

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[10] The State failed to respond to Nichols' Objections to the District Court's Conclusions of Law and Request for Habeas Relief filed with the Texas Court of Criminal Appeals on July 5, 2001.

C. The Diligence Determination Is Inconsistent With Well-Established Law.

The district court concluded that the applicant failed to show that any undisclosed information could not have been obtained by the defense's due diligence. RCL at 4. This determination was affirmed by the Texas Court of Criminal Appeals' two-page opinion affirming the district court's denial of relief. The district court's finding that defense counsel acted without due diligence to discover Ishman and her testimony is contrary to this Court's decision in *Strickler v. Greene*, 527 U.S. 263 (1999). This Court should grant review to clear up Texas' misperception regarding the requirement for diligence on part of the defense counsel.

In *Strickler v. Greene*, the district attorney "maintained an open file policy." 527 U.S. at 276. Prosecutors gave Strickler's trial counsel the opportunity to review their file, so trial counsel did not file a pretrial motion for discovery of possible exculpatory evidence, or seek to review police files. *Id.* It was subsequently revealed that some police files contained notes proving that the key eyewitness had given several inconsistent statements. *Id.* at 270-75. Because police apparently had not informed prosecutors of these inconsistent statements, the transcriptions of them were not in the State's file when trial counsel reviewed it. *Id.* at 274-75.

Strickler's state habeas counsel made no effort to obtain discovery. *Id.* at 279. As a result, Strickler did not obtain the inconsistent statements until federal habeas counsel received a broad discovery order from the federal district court "granting petitioner's counsel the right to examine and copy all of the police and prosecution files in the case." *Id.* at 278.

Rejecting formidable arguments that Strickler's state habeas counsel had not exercised due diligence, the Supreme Court ruled that Strickler's "failure" to present *Brady* claims to the state court was excused:

> Three factors explain why trial counsel did not advance this claim: The documents were suppressed by the Commonwealth; the prosecutor maintained an open file policy; and trial counsel

> was not aware of the factual basis for the claim. The first and second factor – *i.e.*, the non-disclosure and the open file policy – are both fairly characterized as conduct attributable to the State that impeded trial counsel's access to the factual basis for making a *Brady* claim. . . . If it was reasonable for trial counsel to rely on, not just the presumption that the prosecutor would fully perform his duty to disclose all exculpatory materials, but also the implicit representation that such materials would be included in the open files tendered to defense counsel for their examination, we think such reliance by counsel appointed to represent petitioner in state habeas proceedings was equally reasonable.

Id. at 283-84.

The explicit holding in *Strickler* is that reasonably diligent counsel, when determining the proper scope of their investigation, are entitled to rely on prosecutor's sworn statements, and trust that the prosecution will not conceal evidence. In this case, the State not only assured the defense that all discoverable material would be provided without the need for further discovery motions, there were explicit representations that Ishman was "McGee" and could not be located. At neither stage of the proceedings did the State tell the defense that "McGee" was Ishman, nor that she had been located and had provided contradictory testimony. In fact, the State expressly denied such knowledge. Thus, in the trial court proceedings, the state promised to disclose such material, did not correct the misrepresentations when they became apparent, and continued to mislead the defense about the identity and whereabouts of the only other eyewitness.[11]

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[11] This issue is virtually identical to one this Court is considering in *Banks v. Cockrell*, (No. 02-8286) where the Texas trial prosecutors: (1) assured the defense that all discoverable material would be disclosed, when it was not; (2) failed to correct the witness when he perjured himself by failing to disclose his true status as a paid informant; and (3)

(Continued on following page)

Given these circumstances, *Strickler* teaches that Nichols could reasonably conclude that whoever the other eyewitness was, it was not Ishman. Thus, review is warranted because the Texas Court of Criminal Appeals' decision is contrary to this Court's jurisprudence.

CONCLUSION

For the foregoing reasons, Joseph Bennard Nichols requests this Court to grant review.

Respectfully Submitted,

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underscored the informant's testimony by guaranteeing the jurors that the informant's testimony was completely truthful.

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Appendix A – Application for Writ of Habeas Corpus from Harris County Denied by the Texas Court of Criminal Appeals Filed on March 12, 2003 ..... App. 1

Appendix B – Revised Order of the Texas Court of Criminal Appeals Filed April 30, 1997 ..... App. 4

Appendix C – Order on Nichols' Proposed Findings of Fact Entered in the 178th District Court of Harris County, Texas Filed on May 13, 1998 ..... App. 6

Appendix D – Order on Nichols' Proposed Conclusions of Law and Mixed Questions of Law and Fact Entered in the 178th District Court of Harris County, Texas Filed on April 9, 2001 ..... App. 44

Appendix E – Order on Respondent's Proposed Findings of Fact and Proposed Conclusions of Law Entered in the 178th District Court of Harris County, Texas Filed on April 9, 2001 ..... App. 64

EXHIBITS

Exhibit A – Cindy Johnson's Statement taken October 13, 1980 at 12:35 pm ..... App. 106

Exhibit B – District Attorney Interoffice Memorandum ..... App. 108

Exhibit C – Willie Ray Williams' Statement taken October 17, 1980 at 6:30 pm ..... App. 109

Exhibit D – Prosecutor Request for Evidence submitted on January 28, 1981 ..... App. 112

Exhibit E – Cindy Johnson's April 1992 Affidavit .... App. 115

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Exhibit F – Prosecutor Jones' Juror Information Sheet for Nichols' Second Trial ..... App. 119

Exhibit G – Nichols' Second Trial Transcript excerpts ..... App. 120

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Exhibit J– Nichols' Second Trial Transcript excerpts ..... App. 129

Exhibit K – Nichols' Federal Evidentiary Hearing on March 19, 1992, in the Southern District of Texas before Judge David Hittner ..... App. 132

APPENDIX A

[LOGO]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. 21,253-02

EX PARTE JOSEPH BERNARD NICHOLS, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS FROM HARRIS COUNTY

Per Curiam.

ORDER

(Filed March 12, 2003)

This is a post conviction application for writ of habeas corpus filed pursuant to the provisions of Article 11.071, V.A.C.C.P.

On March 10, 1982, Applicant was convicted of the offense of capital murder. The jury answered the special issues submitted pursuant to Article 37.071, V.A.C.C.P., and the trial court, accordingly, set punishment at death. Applicant's conviction was affirmed on direct appeal to this Court. *Nicholas v. State*, 754 S.W.2d 185 (Tex. Crim. App. 1988), *cert. denied*, 109 S.Ct. 819 (1989).

Upon receipt of this application, this Court remanded to determine if the State suppressed evidence of the whereabouts of a witness and whether or not the evidence which would have been given by that witness was material. An evidentiary hearing was conducted and the trial court has entered findings of fact and conclusions of law along with a recommendation that relief be denied. Included within the findings are those set forth below:

> 2. the applicant fails to show the materiality of any undisclosed information, i.e., that such information creates a reasonable doubt of guilt that did not otherwise exist so that the results of the proceeding would have been different. **See United States v. Agurs**, 427 U.S. 97, 110, 96 S.Ct. 2392, 2400 (1976); **United States v. Bagley**, 473 U.S. 667, 105 S.Ct. 3375 (1985); **Ex parte Adams**, 768 S.W.2d 281 (Tex. Crim. App. 1989) (court adopted the materiality standard set forth by Supreme Court in **Bagley**, and held that a reasonable probability is a probability sufficient to undermine confidence in the outcome).
>
> 3. the applicant fails to show that any undisclosed information, is material when evaluated in light of the entire record. **See Crawford v. State**, 617 S.W.2d 925, 931 (Tex. Crim. App. 1980); **Quinones v. State**, 592 S.W.2d 933 (Tex. Crim. App. 1980); **see also Nichols v. Scott**, 69 F.3d 1255 (5th Cir. 1995) ("[n]or do the 1992 affidavits [affidavits of Teresa McGee and Cindy Johnson] show a probability of a different result sufficient to undermine confidence in the outcome).

Supplemental Writ Transcript at page 796. The findings of the habeas court generally, and more importantly, those set forth above, are supported by the record.

This Court has reviewed the record from that hearing with respect to the allegations made by Applicant. Based upon the trial court's findings, especially those set forth above, and our own review, the relief sought is denied.

IT IS SO ORDERED THIS THE 12TH DAY OF MARCH, 2003.

DO NOT PUBLISH

APPENDIX B

EX PARTE JOSEPH BERNARD NICHOLS	Habeas Corpus Application
WRIT NO. 21,253-02	from HARRIS County

REVISED ORDER

In response to the State's Motion Requesting Clarification of this Court's Order dated April 16, 1997, the Court enters this Revised Order.

This is an application for a writ of habeas corpus which was transmitted to this Court by the clerk of the trial court pursuant to the provisions of Article 11.071, V.A.C.C.P. Ex Parte Young, 418 S.W.2d 824 (Tex.Cr.App. 1967). Applicant was convicted of capital murder and punishment was assessed at death. This conviction was affirmed. Nichols v. State, 754 S.W.2d 185 (Tex.Cr.App. 1988), *cert. denied*, 109 S.Ct. 819 (1989).

In his present application, Applicant contends, inter alia, that the State suppressed material, exculpatory evidence, specifically, the name and location of witness Teresa McGee a.k.a. Teresa Henry a.k.a. Teresa Ishman.

The trial court has entered an order finding "the instant application . . . is a subsequent application" pursuant to Art. 11.071, § 5(b). However, it is the Court's belief that the requirements of Art. 11.071, § 5(a), have been satisfied, but *only* as to the specific claim that the State suppressed material, exculpatory evidence, specifically the name and location of Ishman, in that this particular claim has not been and could not

have been presented previously because the factual basis for the claim was unavailable. See Art. 11.071, § 5(c). Therefore, this case is remanded to the trial court to address *only* Applicant's claim that the State suppressed material, exculpatory evidence, specifically the name and location of Ishman. The trial court is ordered to proceed with this application pursuant to Art. 11.071, § 6(b), et. seq., *only* as to this particular claim, that the State suppressed the name and location of Ishman.

PER CURIAM

DELIVERED: April 30, 1997
DO NOT PUBLISH

APPENDIX C

Cause No. 323836-B

Ex parte	§	In the 178th District Court of
	§	
Joseph Bennard Nichols	§	Harris County, Texas

ORDER ON NICHOLS' PROPOSED FINDINGS OF FACT

(Filed May 13, 1998)

The Court finds the following facts and rejects the following facts as indicated below:

1. The robbery occurred on October 13, 1980.

[GRANTED]/~~DENIED~~

a. There were only five persons inside the store at the time of the crime: the deceased (Claude Shaffer, Jr.), the two defendants (Willie Ray Williams and Joseph Nichols), and two other store employees (Cindy Johnson and Teresa Henry).

[GRANTED]/~~DENIED~~

b. Johnson was interviewed by the police.

[GRANTED]/~~DENIED~~

c. Teresa Henry gave a false name (Teresa "McGee") to the persons at the scene and was ***not*** interviewed by the police. Exhibits 1A, 1B at 480,[1] and 1C; State's exhibits 6 and 9.

~~GRANTED~~/[DENIED /s/ WTH]

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[1] Although the police report implies that a Dolly "Sanders" was in the store at the time, the testimony of Dolly "Jefferson" in Williams' trial is clear that she left before shots were fired. Exhibit 1B at 480. Cindy Johnson's testimony in both Nichols' trials confirms the same fact.

d. Ms. Henry is now named Teresa Henry Ishman. (Transcript, Vol. 1, at 6, 13.

[GRANTED]/~~DENIED~~

2. Nichols's counsel was never apprised about the identifying characteristics of Ms. Ishman or the substance of her testimony.

~~GRANTED~~/[DENIED]

a. All defense counsel, Neil Lane (Petitioner's Exhibit 54), Robert Scott (Exhibit 51), and Raymond Dickens (Exhibit 55) testify that they were never informed that the real name of Teresa "McGee" was Teresa Henry or Teresa Ishman, or that she had been extradited to Bogalusa Louisiana and was located in Louisiana at the time of both of Nichols' trials. [Copy struck by /s/ WTH]

[GRANTED]/~~DENIED~~

b. There is not a single mention of the name Teresa Henry in the public records related to the trial of Willie Ray Williams or the two trials of Joseph Nichols. Every mention of the witness' name in the pleadings, transcripts, and subpoenas is of Teresa "McGee."[2]

[GRANTED]/~~DENIED~~

c. A.D.A. Beers confirms that he did not know Ms. Henry Ishman's true name and location, that her true name and location were not in the State's file when it was reviewed on the record. Transcript Vol. 2, at 25-27.

[GRANTED]/~~DENIED~~

---

[2] There is no exhibit to this point, because the point is negative – there is no such evidence.

d. A.D.A. Beers and former Assistant District Attorney Oncken testify that the District Attorney's file would not have been open following the start of voir dire in the first case. In any event, however, there is nothing in the record to dispute that Defense Counsel never again reviewed the file, never knew Ms. Henry Ishman's true name or location. Finally, there was never anything in any State file that revealed the nature of Ms. Henry Ishman's testimony.

~~GRANTED~~/[DENIED]

3. On or about December 31, 1980, A.D.A., now Judge, Bob Burdette interviewed Teresa Henry Ishman, who told A.D.A. Burdette she saw the decedent pull a gun before any defendant (Williams or Nichols) fired their weapons. Exhibit 3A;[3] Trans. Vol. 1 at 58-60; *see also id.* at 10-11, 39-40, 52-54. Ms. Henry Ishman also told A.D.A. Burdette that the other eyewitness, Ms. Cindy Johnson, could not have seen the fatal shots being fired, because she was hidden in the bathroom when the shooting started. *Id.* at 8-9, 11, 39, 55. Ms. Henry Ishman also told A.D.A. Burdette that she gave the police a false name because she was subject to an outstanding arrest warrant in Louisiana. Transcript Vol. 1, at 58-60; *see also id.* at 10-11, 39-40, 52-54.

[GRANTED]/~~DENIED~~

[3] Exhibit 3A, a memo in Burdette's file related to his prosecution of Willie Ray Williams, discloses the interview and Ms. Henry Ishman's correct name, address, and social security number. The memo, however, does not reveal all of the information known by Ms. Henry Ishman, including the substance of her testimony or the fact that she was moving back to Bogalusa, Louisiana.

4. Ms. Henry Ishman's testimony about what she told A.D.A. Burdette is uncontroverted and corroborated by outside sources.

~~GRANTED~~/[DENIED]

a. Judge Burdette confirms that he interviewed Ms. Henry Ishman, but states that he does not remember what she said. Exhibit 4A.

[GRANTED]/~~DENIED~~

b. [Copy struck by /s/ WTH]. Ron Mock, defense counsel for Williams, testifies that A.D.A. Burdette told him that "there were two women employees in the store, both of whom saw the decedent pull his gun." Exhibit 52 ("Mock Affidavit") ¶ 4.

[GRANTED]/~~DENIED~~

c. In addition, Ms. Henry Ishman's testimony is consistent with A.D.A. Burdette's trial of Williams, as he did not call Cindy Johnson as a witness, and he did not put on any testimony that disputed Williams' testimony that the decedent pulled a gun. Exhibit 4B (Excerpts from William's transcript). Williams testified without contradiction that Shaffer pulled a gun.[4] The prosecution challenged that testimony based

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[4] Q. Why did you shoot the gun?
A. To protect myself.
Q. Were you in fear of your life?
A. Yes, sir.
Q. Why, sir, were you in fear of your life?
A. Well, I seen the gun when it came up. I never had a gun drawn on me before. I knew what kind of gun it was. I was just protecting myself, and I was scared.
Exhibit 5B at 619.

solely on the position of the gun after the shooting, not on any witness' testimony. *Id.* [Copy struck by /s/ WTH]. Transcript of testimony at 76 and, *e.g.*, exhibit 5 in Nichol's first trial. Mr. Mock also states: "At the trial of Willie Ray Williams, it was not disputed that the decedent, Claude Shaffer, had pulled a gun, and therefore, it was unnecessary for the defense to present evidence on this point." Mock Affidavit at ¶ 4.

[GRANTED]/~~DENIED~~

d. Ms. Henry Ishman's testimony is also confirmed by records from the Harris County Sheriff's Department and from Washington Parish in Louisiana, which substantiate her testimony regarding her extradition to Louisiana before Nichols' first trial. See Fact Finding 9.

[GRANTED]/~~DENIED~~

5. On January 28, 1981, Ira Jones submitted a request that Teresa "McGee" be found that notes, "J.R. Harrison knows where she is." Exhibit 5A. J.R. Harrison is the same investigator that found Ms. Henry Ishman for A.D.A. Burdette. Nichols' file also contains an undated handwritten notation on the bottom of a November 1980 letter from A.D.A. Holliman to "McGee," stating, "Ira, There is NO Teresa McGee. If you need her see me." Exhibit 5B (emphasis in original). The "NO" in that handwritten notation is written substantially larger than the other words in the note and is emphatically underscored. *Id.* The handwriting on exhibit 5B is J.R. Harrison's. Exhibit 5C at 75-76.

[GRANTED]/~~DENIED~~

6. On January 30, 1981, the jury in Williams' trial returned a verdict answering all punishment issues, "yes." Exhibit 6.

[GRANTED]/~~DENIED~~

7. Williams' was tried as the man who actually shot the decedent, and not under the law of the parties. Williams' prosecutor, Judge Burdette, acknowledges that fact, exhibit 7A, which was also confirmed by the Texas Court of Criminal Appeals when it affirmed Williams' capital conviction:

> Both men pulled guns on Claude Shaffer, the man behind the counter. Shaffer reached for and grabbed a pistol which he pointed at [Williams]. . . . Nichols went out the door, but [Williams] turned back toward the counter and saw Shaffer squatting with his back to [Williams]. [Williams] shot Shaffer in the back, killing him, ran out of the store, and came back inside. . . . [and] removed a box which contained money from behind the counter.

Williams v. State, 674 S.W.2d 315, 317 (Tex. Crim. App. 1984) (exhibit 7B).

[GRANTED]/~~DENIED~~

8. The jury accepted the State's evidence and argument, and Williams received a death sentence on January 30, 1981. Exactly 14 years later, he was executed. [Judicial Notice; *see* exhibit 8, Houston Chronicle article]

[GRANTED]/~~DENIED~~

9. In March of 1981, the State, acting through the Harris County Sheriff's Department, arrested Ms. Henry Ishman on her fugitive warrant from the State of Louisiana, and on March 28, 1981, she was released to police officers from the State of Louisiana and brought to that State. Ms.

Ishman's testimony and Exhibit 9A.[5] On April 2, 1981, Ms. Henry Ishman was released on a $10,000 bond from the Twenty-Second Judicial District Court of Louisiana, Parish of Washington. Exhibit 9B (records of that court). The records of that Court also contain Ms. Henry Ishman's address in Bogalusa, Louisiana, 731 May Ave., which is where she continues to live today. *Id.*; Transcript of Ishman testimony at 6.

[GRANTED]/~~DENIED~~

10. On May 19, 1981, Nichols' counsel moved for discovery, including:

> "5. A list of the names and addresses of witnesses known to the State who have knowledge of the facts of the present cause;
>
> . . . .
>
> 7. Any evidence or information in the possession or control of the State of Texas or known to the agents of the State which is inconsistent with the guilt of the Defendant, or which might tend to ameliorate the punishment of the Defendant in the event of a finding of guilt. . . . "

Exhibit 10.

[GRANTED]/~~DENIED~~

11. On May 22, 1981, an investigator for the District Attorney's Office, R. O. Biggs, removed the scene photographs from the District Attorney's Williams file in order to prepare for Nichols' trial. This is the last note on any Williams file about any review by anyone, and the only

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[5] [Copy struck by /s/ WTH].

notation that any documents had been removed from the file for use in Nichols' trial. Exhibit 11. The file cover also reveals that defense counsel for Williams reviewed the District Attorney's file in the Williams matter on November 20, 1980, before the District Attorney's Office had found and interviewed Teresa Henry Ishman. *See* exhibits 3 and 11.

[GRANTED]/~~DENIED~~

12. On June 4, 1981, at a hearing in the Nichols proceeding, the State affirmatively agreed to disclose the names and addresses of all witnesses known to the State. It attempted to fulfill that agreement by tendering the State's file ***in the Nichols' matter, but the file did not contain any information about Ms. Henry Ishman.***

[GRANTED]/~~DENIED~~

a. The State expressly stated that it did not oppose the defense's request for the production of "the names and addresses of witnesses known to the State who have knowledge of the facts of the present cause."

[GRANTED]/~~DENIED~~

b. At the hearing Ira Jones agreed to make such disclosures by providing access to his files:

> "Mr. Jones: When we had our setting I offered to the Court to allow them access to my complete file except my trial notes and outline at their convenience. Mr. Lane has not made one attempt to come by and look at these. I have not heard from Mr. Dickens in that regard for the record at this time.
>
> I have already shown my complete file to Mr. Dickens. . . . . In addition to

that State will tender to him copies of additional subpoenas which have been filed with the court last week."

Exhibit 12 at 3.

[GRANTED]/~~DENIED~~

c. Defense counsel asked for more time to review the District Attorney's file, and were given approximately two and one-half hours to do so.

"Mr. Dickens Your Honor, at this time it is the position of the Defense that we would not be ready to begin voir dire selection on this day for the reason that although there was an agreement, the co-counsel appointed in this matter was to have an opportunity to review the file of the district attorney and read whatever statements, listen to the tapes, examine the pictures and just examine the entire file that we feel like it would be best in this cause if he has an opportunity to do so prior to the beginning of the selection of the jury.

In addition to that it may be that we may have one or more additional motions to file after he has an opportunity to examine the district attorney's file and the three of us lawyers have another opportunity to confer over this matter.

The Court: It is now 11:25. I'll recess the matter until 2:00 so that you may have the opportunity to review the matter. The Court will be ready to proceed with this matter at 2:00.

Mr. Lane: May I address the Court? If it please the Court, Your Honor. While we might have an opportunity to go over these documents and look at the file and read it, we really wouldn't have an opportunity to prepare any pre-trial motions by 2:00. Could we impose on the Court to recess this case until Monday?

The Court: No. I will not reschedule. . . . [T]he Court does not see why you cannot review the matters that the State has offered to make available to you between now and 2:00 and determine what position with reference thereto, at that time. Mr. Dickens being the lead counsel in this matter I would have to ask that he respond to the Court in that regard.

Mr. Dickens: Well, Your Honor, I have examined the file in the district attorney's office and as I recall it took me 2 and ½ to 3 hours to go through the district attorney's file and I would say that in order for us to prepare whatever needs to be prepared we would need some additional time. . . .

The Court: . . . .

Can't you do that [review the file] between now and 2:00? It is now only 11:30. That's 2 and ½ hours. I would think with the matters you have already had access to you would be able to apprise your co-counsel in the matter

as to what matters are of issue in it. . . . ."

[The Court then recessed]

Id. at 10-13.

[GRANTED]/~~DENIED~~

d. Then, to fulfill its *Brady* obligations, the District Attorney's Office tendered its file in the Nichols matter:

The Court: . . . .

I will now instruct the six jurors we have already summoned over to be back at 2:00 and I will hear from you at that time.

Mr. Jones: May it please the Court and may the record reflect that in addition to what I have already placed on Defense counsel table that I am tendering to them my complete file which includes the offense reports, evidence as to punishment, witness statements, laboratory reports, subpoenas, everything that I possess except my trial outline. I am tendering them to them now for their observation and ask them to note under punishment there is a certified judgment of probation that he is now on for robbery. . . . and ask that the record so reflect that all of these things are being tendered to Defense on this day June 4 a month in advance of trial.

The Court: Let the record so reflect."

Id. at 15-16.

After recess:

"The Court: Are we ready to proceed in the matter of State of Texas vs. Joseph Bernard Nichols? Has the Defense counsel now had an opportunity Mr. Dickens, to examine the matters that the State had made available for inspection in this case?

Mr. Dickens: Yes, Your Honor, we have had an opportunity to examine."

Id. at 17.

[GRANTED]/~~DENIED~~

e. The file supplied for defense counsel's review did not contain Teresa Henry Ishman's true name, location, or social security number.

[GRANTED]/~~DENIED~~

i. All defense counsel testify that they were focused on finding the one missing eyewitness – Teresa "McGee" – and that the file they reviewed did not contain that information. Petitioner's Exhibits 51 (Scott), 54 (Lane), 55 (Dickens).

[GRANTED]/~~DENIED~~

ii. Former A.D.A. Beers also testifies that the State's file for the Nichols' prosecution did not contain Ms. Henry Ishman's name and location in Bogalusa. Transcript Vol. 2 at 25-27.

[GRANTED]/~~DENIED~~

iii. The State subpoenaed Teresa "McGee," [Copy struck by /s/ WTH]. *See* exhibit 16.

[GRANTED]/~~DENIED~~

iv. The only document dated prior to defense counsel's review that is contained in any District Attorney file that reveals such information was contained in A.D.A. Burdette's file in Williams' case, not Nichol's file. *See* exhibit 3.

[GRANTED]/~~DENIED~~

13. Voir dire in Nichols' first trial commenced on the same day that the file was reviewed, June 4, 1981. Exhibit 13.

[GRANTED]/~~DENIED~~

14. The State represented:

(a) that it would fulfill its *Brady* obligations through its subpoena list, [Copy struck by /s/ WTH]

[GRANTED]/~~DENIED~~

(b) that it would show any new information to the defense counsel.

[GRANTED]/~~DENIED~~

a. On June 22, 1981, another pre-trial hearing is held with the same participants. At the hearing, the District Attorney's Office, though [sic] Jones, stated that if something new "exists, when I receive it, I will be happy to give a copy to the defense." PE 14 at 20.

[GRANTED]/~~DENIED~~

b. The State, through Jones, also represented that it had supplied defense counsel with the names of all witnesses, and specifically that it had done so by providing access to its file in the Nichols case and through its subpoena list:

> Mr. Jones: Your Honor, if this will clarify the record any as to form as to the offense, now the capital murder for which the defendant is now on trial all

> names of witnesses, photographic displays, photographs and types of identifications the defendant is asking about has already been shown to the defense as for the capital murder offense."

Exhibit 14 at 22.

> "The Court: Gentlemen, on your motion, Defendant's Motion for Discovery and Inspection I suppose the best way to take these matters up as you have them set out here. Some of them have been resolved but to make the record clear."
>
> Jones: "Yes sir, when I have one made I will be happy to show them."
>
> Jones: ***"The minute the evidence comes in I'll show it to the Court as soon as I get my hands on it and advise the Court. The Court: All right. So them [sic] that the counsel can be advised of it also."***

Id. at 24 (emphasis added).

> "Mr. Jones: From the beginning when we had our first discovery or hearing the State offered to show them most everything and I opened my file to them at their convenience."

Id. at 25.

[GRANTED]/~~DENIED~~

c. The Court expressly admonished Jones about his *Brady* obligations. *Id.* at 30.

[GRANTED]/~~DENIED~~

d. The State repeatedly stated that if it uncovered any proof of the type requested it would provide a copy to the defense:

> " . . . we will give a copy if this exists to the defense." *Id.* at 31.
>
> "Should I discovery any other photographs used for that sort of thing I will show them the photographs." *Id.* at 33.
>
> " . . . ***I don't know of any and should I find them or come to my attention [sic] I certainly will show them to the defense***." *Id.* at 33 (emphasis added).
>
> "If there are any photographs in there we'll show them to the defense. ***As to any other witnesses should they become availble we'll show them to the defense***." *Id.* at 34.
>
> " . . . as to any other offenses I know of none at this time but should they become available I'll show them to the defense. The Court: ***Then the Court will make no further ruling on the matter at this time***." *Id.* at 35 (emphasis added).
>
> " . . . ***if they become available I'll show them to the defense as soon as I recover them***." *Id.* at 36.

[GRANTED]/~~DENIED~~

e. The Court noted on the record that the requested list of names and addresses of witnesses was being supplied through the District Attorney's subpoena list:

"The Court: All right. Let the record reflect. I'll make no further rulings on the matter.

A list of all the names and addresses of all the prospects of the prosecution witnesses who have knowledge and the likelihood will be used at the guilt and/or as rebuttal witnesses relating to the alleged escape attempt and other offenses involved with this defendant. You indicated Mr. Jones, you proposed to submit or file an amendment to your subpoena request and as the Court understands that will contain the names of those witnesses who might be called on direct examination concerning such matters?

Mr. Jones: Yes, sir. The State has already filed our subpoenas and we'll amend thereto and filed [sic] a witness list and other subpoenas.

Id. at 36-37.

[GRANTED]/~~DENIED~~

f. Again, the Court noted that the State had said it would comply with its *Brady* obligations:

"The Court: .... The paragraph Roman numeral VII. This is Brady vs. Maryland matter which I have already admonished counsel about and counsel for the State has already acknowledged that they will undertake to fully comply

with their obligations in regard to the Brady vs. Maryland. . . . "

Id. at 39.

[GRANTED]/~~DENIED~~

15. On July 7, 1981, there is another pre-trial hearing with Scott, Dickens, Lane, Jones, and Beers present. At the hearing, Jones once again notes that his disclosure of witnesses would be done in the form of a subpoena list:

> "Mr. Jones: Yes, sir. We have filed a subpoena already which is on file with the Court as to the witnesses we may possibly call on the question of direct evidence. . . . . [but not rebuttal]
>
> The Court: Then let the record so reflect and he says he will make available to you all the witnesses the State proposes to use on its direct proof in the matter and without cutting itself off as to any rebuttal witnesses should any be called.
>
> Mr. Jones: We've already given them a copy of the subpoena list and witness list as relates to that request except for the rebuttal witnesses.
>
> The Court: Is that correct, Mr. Dickens?
>
> Mr. Dickens: He has given us a copy of the subpoena list and certainly we would like to inquire as to whether or not there are any other witnesses that he has intentions of calling that he knows about now since he gave us that subpoena list.

> The Court: Are there any other additional ones, Mr. Jones?
>
> Mr. Jones: Not that I know of that I will call on direct evidence, Your Honor."

Exhibit 15 at 15-16.

[GRANTED]/~~DENIED~~

16. Also on July 7, the State filed its subpoena list, which [Copy struck by /s/ WTH] identified "Teresa McGee" as the eyewitness, without revealing [Copy struck by /s/ WTH] social security number.

Exhibit 16.

[GRANTED]/~~DENIED~~

a. The State's subpoena list demonstrates that the State had not revealed the witness' true name and identifying characteristics and that such information was not contained in the State's file disclosed to defense counsel.

~~GRANTED~~/[DENIED]

b. In accordance with Article 24.03 of the Texas Code of Criminal Procedure, Ira Jones swore in the subpoena application "that the testimony of said witness [Ms. "McGee"] was believed to be material to the State." *Id.*

[GRANTED]/~~DENIED~~

c. A.D.A. Beers testified that he would not have subpoenaed "McGee" in Houston if the file had shown that her true name was Henry and that she was living in Bogalusa.

[GRANTED]/~~DENIED~~

17. At the start of Nichols' first trial, on July 16, 1981, the State was unable to serve its subpoena on Teresa "McGee." Exhibit 17.

[GRANTED]/~~DENIED~~

18. On the same day, defense counsel moved for the attachment of "Teresa McGee," stating that she had been subpoenaed but not found. Exhibit 18.

[GRANTED]/~~DENIED~~

a. Defense counsel expressly stated that "McGee" was "material to the defense of Joseph Bennard Nichols," and that the defense had "relied on the subpoena . . . issued by the State." *Id.*; *see also* exhibit 17.

[GRANTED]/~~DENIED~~

b. The motion was granted. *Id.*

[GRANTED]/~~DENIED~~

19. Defense counsel also moved for a continuance based on the inability to find this witness. Exhibits 17 and 19.

[GRANTED]/~~DENIED~~

a. Again, defense counsel stated that "McGee" was "material to the defense of this case" because she was "present @ the time and place. . . . " Exhibit 19.

[GRANTED]/~~DENIED~~

b. This motion was denied. *Id.*; *see also* exhibit 17.

[GRANTED]/~~DENIED~~

20. Nichols' first trial started on July 17, 1981. Exhibit 20.

[GRANTED]/~~DENIED~~

21. On July 21, 1981, the State called Howard Coleman, an employee of Dean's Grocery and Delicatessen.

[GRANTED]/~~DENIED~~

a. The questioning of Mr. Coleman reveals that Teresa Henry Ishman's true identity had not been disclosed.

~~GRANTED~~/[DENIED]

b. The State questioned Coleman about McGee/Henry's whereabouts:

> "Q. [By Jones] . . . Who was inside the store?
>
> A. Just Cindy and another employee and I think one other lady.
>
> Q. Who is this other party?
>
> A. I don't know. She was at the bus stop at the time. . . . . "

Exhibit 21 at 203.

[GRANTED /s/ WTH]/~~DENIED~~

c. Defense counsel (Scott) also asked Mr. Coleman about "McGee," indicating that they did not know her true name:

> "Q. [By Scott] Who were the other employees there?
>
> A. Cindy and I think the young lady's name is Traci.
>
> ***Q. Could it have been Theresa McGee?***
>
> A. Yes, that's her.
>
> Q. And she was there when you got back to the store; is that correct?

A. Right, she was there when I arrived and she was there when I returned."

Id. at 207 (emphasis added).

[GRANTED]/~~DENIED~~

22. On the same day, the State put on sworn testimony that it could not find "Teresa McGee," further proof that her true identity had not been revealed.

"Mr. Jones: If it please the Court, Your Honor, may I call Mr. Terry Earl to the stand outside the presence of the jury for the purpose of putting on the efforts that he has made to find these two missing witnesses?

The Court: Yes, sir.

. . . .

Q. Have you made any efforts to find the witness Theresa McGee?

A. Yes, sir, I have.

Q. What efforts are those?

A. On the 14th of July I went out to a location at the 7600 block of Phoenix which turned out to be the Continental Apartments. The exact address on the attachment for this witness was 7605 Phoenix.

Q. Who issued those attachments?

A. The defense, sir.

Q. All right, sir.

A. The 7605 location turned out to be the Barcelona section of the Continental Apartments. I spoke with the manager there who advised me that this Theresa McGee was not listed as a resident and was not known to be living out there with anyone under that name to their knowledge on any of the leases in that particular section. That was the section of the Barcelona section of the apartment complex.

Q. Did you make any other effort to find Ms. McGee?

A. I also contacted Mr. Dean McDaniels who was one of the State's witnesses involved in this and asked him if he had any further contact with her.

Q. Excuse me. What is Mr. McDaniels' prior relationship to Ms. McGee?

A. I don't know for sure, sir. If I remember correctly, he was in the store at the time this offense occurred or the night this offense occurred or something anyway. He advised me he no longer knew where she was at. I contacted his bookkeeper, a Ms. Jane Reyes attempting to ascertain a social security number, if possible, to try and go that way and find out if she is now employed somewhere. That was to no avail.

Q. Did you make any other efforts.

A. Not on Ms. McGee."

Exhibit 22.

[GRANTED]/~~DENIED~~

23. During closing argument in the guilt/innocence phase of the trial, the testimony of Cindy Johnson, [Copy struck by /s/ WTH], was again emphasized. Since the transcription of Ms. Johnson's testimony was inadvertently lost by the Court Reporter, this is the only evidence of the importance of her testimony in Nichols' first trial, but the arguments suffice to demonstrate that the State relied heavily on Ms. Johnson's testimony.

[GRANTED]/~~DENIED~~

a. A.D.A. Beers for the State stated:

> [Cindy Johnson's testimony corroborates testimony of accomplices, Parker and Harvey to get conspiracy.] "Look at the testimony of the non-accomplices in deciding whether it's a corroboration or not."

Exhibit 23 at 12-13.

> "Next you look to the offense of robbery. . . . did he enter into a conspiracy to rob Claude Shaffer, Jr. Yes. The evidence shows that through the testimony of Cindy Johnson with his actions, the testimony of James Rivera, seeing him come out of the store. That puts him at the scene."

Id. at 13.

> "You start talking about what was the intent. Again we look to the actions and

> the testimony of the other witnesses. Cindy Johnson, she was the one inside the store. She saw it happen. What does she tell us?. . . . Claude Shaffer never touched that gun. . . . [Rivera] doesn't have any idea what's going on in there. . . . he's not in there. He's outside the store."

Id. at 16.

> "Cindy told us about that."

Id. at 19.

> "Ask yourself about what Ms. Johnson told us. . . ."

Id. at 20.

[GRANTED]/~~DENIED~~

b. The question of whether Shaffer pulled a gun was also an issue at this phase of the trial; defense counsel argued that both Williams and Nichols said immediately after the crime that Shaffer pulled a gun, and they had to shoot. *Id.* at 28-29.

[GRANTED]/~~DENIED~~

c. Also during closing, defense counsel Dickens, clearly showing that he still believed the missing witness was named Teresa McGee, stated:

> "Then she [Cindy Johnson] turned and went back where there was another employee, ***Teresa McGee***, who was back in the restroom, I believe she said."

Id. at 25 (emphasis added).

[GRANTED]/~~DENIED~~

24. The core defense presented in behalf of Nichols was that Williams killed after Nichols had abandoned the crime. Central to that theory and its refutation by the State was the testimony of Cindy Johnson, the witness who is impeached by Theresa Henry Ishman.

[GRANTED]/~~DENIED~~

a. Attorney Dickens argued that William's action was an independent impulse, so Nichols could not be convicted of capital murder. Exhibit 24 at 33.

[GRANTED]/~~DENIED~~

b. Defense counsel Lane also argued that Nichols abandoned the crime when he went out the door: "At that point he terminated any conspiracy. He was no longer a party to that crime. He is guilty of something, but he is not guilty of capital murder or murder." *Id.* at 36-37; *see also id.* at 38.

[GRANTED]/~~DENIED~~

c. Defense counsel Scott returns to the same point, arguing that if Nichols changed his mind and ran out, the conspiracy was over; for example:

> "Willie goes down the street. Then he comes back in. Willie goes around the block and then he comes back in. It is finally the second he steps out the door and Joseph Bernard Nichols keeps running. . . ."

Id. at 46-47; *see also id.* at 49.

[GRANTED]/~~DENIED~~

d. This defense was consistent with the prosecution of Williams.

[GRANTED]/~~DENIED~~

25. Defense counsel was forced to deal with the testimony of Cindy Johnson, the State's key witness, without the benefit of Teresa Henry Ishman's testimony:

~~GRANTED~~/[DENIED]

a. For example:

> Lane: "All right, who sees this besides Willie Ray Williams? Cindy Johnson, the bells. She heard them all go out and then she heard them come back in. Then she heard a shot and then she heard them leaving out again. That's the State's witness."

Exhibit 25 at 37-39.

[GRANTED]/~~DENIED~~

b. The defense's attack on Cindy Johnson included that there was a missing witness, "Teresa McGee," [Copy struck by /s/ WTH]:

> Scott: "But on cross-examination, Cindy Johnson couldn't even stay consistent with what she at first said because their concept at that time, knowing what the doctor was going to say, had to do with the man being spun clear around. . . . But, of course, Cindy couldn't stick with that story because she finally admitted that when she went back, the man was still up. She was not aware of the other blood until she came back out talking with ***Teresa McGee, the missing witness.***"

Id. at 44-45 (emphasis added).

[GRANTED]/~~DENIED~~

26. The defense's closing again reveals that it did not know of Henry Ishman's true identity or location: "[Cindy Johnson] was not aware of the other blood until she came back out talking with ***Teresa McGee, the missing witness***." Exhibit 26 at 44-45 (emphasis added).

~~GRANTED~~/[DENIED]

27. The State's counter to these arguments focussed [sic] and relied on the testimony of Cindy Johnson, [Copy struck by /s/ WTH]. For example:

[GRANTED]/~~DENIED~~

a. "Taking into account the testimony of Cindy Johnson [about whether the decedent pulled a gun]." Exhibit 27 at 57.

[GRANTED]/~~DENIED~~

b. "Cindy Johnson is saying, no, he never had that gun." *Id.*

[GRANTED]/~~DENIED~~

c. "Cindy Johnson from the very beginning of that robbery told you that the complainant was shot in the first instance, and he went down. . . . He did not have a gun in his hands." *Id.* at 59.

[GRANTED]/~~DENIED~~

d. "I ask you to take each of these witnesses and test them, why they might want to see something one way or another. Look at Cindy Johnson. . . . She told you Mr. Shaffer did not have a gun." *Id.* at 65-66.

[GRANTED]/~~DENIED~~

e. "A woman [Cindy Johnson] told you in the beginning that they both came in, they both pulled guns. Look at how close she is to standing to Jo-Jo." *Id.* at 70.

[GRANTED]/~~DENIED~~

f. "Another reason why you should consider the testimony of Cindy Johnson is what she did not tell you. . . . " *Id.* at 71.

[GRANTED]/~~DENIED~~

28. On these arguments, the jury found Joseph Nichols guilty of capital murder. Exhibit 28.

[GRANTED]/~~DENIED~~

29. During the punishment phase of Nichols' first trial, the State again relied heavily on the testimony of Cindy Johnson; for example, A.D.A. Beer [sic] (for State) argued, "I suggest to you, look at what Cindy Johnson said. Claude Shaffer, Jr. never touched that gun. There was no provocation." Exhibit 29 at 13.

[GRANTED]/~~DENIED~~

30. The jury deadlocked on the punishment issues and a mistrial was declared on July 31, 1981. Exhibit 30.

GRANTED]/~~DENIED~~

31. Following the mistrial, at a motions hearing in January, the trial court expressly ordered that all prior proceedings, including motions and previous orders of the Court, continued to be effective: "Court would order that it be made part of the record of this trial all motions that were previously filed. . . . Court's rulings remain the same." Exhibit 31.

[GRANTED]/~~DENIED~~

32. At the same hearing, defense counsel again inquired about the State's witnesses, and the State, through Jones, said it was relying on its previous subpoena list, which [Copy struck by /s/ WTH] identified Teresa Henry Ishman as "Teresa McGee":

"Mr. Lane: Additionally, Your Honor, we would like to know if there are any other witnesses other than those that have been subpoenaed at this time that the State intends to use.

The Court: On direct proof in the matter?

Mr. Lane: And would the State be bound by those witnesses that are subpoenaed at this time?

The Court: ***Well, have all witnesses been enumerated on the subpoena request, Mr. Jones***, that the State proposes to use upon direct proof in this case?

Mr. Jones: Only the direct, the case in chief, your Honor, on the question of guilt.

Your Honor, just as the defense has wanted all of their motions to be brought forward into the trial of this case, likewise the State would wants [sic] its subpoenas and witness list to be brought forward from that prior hearing into this case.

The Court: Well, as I understand it, you've issued process now for the witnesses you propose to use upon the trial of direct proof in this case; is that right Mr. Jones?

Mr. Jones: Yes, sir, in the case before and in this case, the defense is asking for a witness list. And ***the State would offer the same witness list that we produced on its case in chief on the issue of guilt that we have files as subpoenas now and all of those witnesses listed in the prior trial.***"

Exhibit 32 at 5-6 (emphasis added).

"Mr. Jones: ***Okay sir, if I may have the file, I will just file as a witness list all of those subpoenas and witness list and everything else that we used in the case before.***"

Id. at 7 (emphasis added).

After the noon recess: "Mr. Jones: If it pleases the Court, ***Your Honor, the State has filed an additional subpoena and with that would agree to substitute its file subpoenas as its witness list on the issue of guilt in this case.***"

Id. at 12 (emphasis added).

[GRANTED]/~~DENIED~~

33. Voir dire began in Nichols' second trial on January 11, 1982, and concluded on February 15. Exhibit 33.

[GRANTED]/~~DENIED~~

34. By February 15, 1982, the District Attorney's Office had once again located Teresa Henry Ishman, as demonstrated by handwritten notes now contained in the State's prosecution file in the Nichols matter, which have dates beginning on February 12 and ending on February 15, 1982. Those notes reveal that the District Attorney's Office had discovered that "Teresa Henry" now lived in Bogalusa, Louisiana. The document also revealed that the District Attorney's Office confirmed that Teresa "McGee" was actually Teresa Henry Ishman be showing her photograph to Cindy Johnson, the other eyewitness. Exhibit 34.

[GRANTED]/~~DENIED~~

35. Also effective February 15, 1982, the State reissued the identical subpoena list as in Nichols' first trial, which

again incorrectly identified "Teresa McGee" and provided an incorrect address. Exhibit 35.

[GRANTED]/~~DENIED~~

36. Both sides announce ready for trial on February 16, 1982. Exhibit 36.

[GRANTED]/~~DENIED~~

[36A. The defense did not make a request for a writ of attachment for the witness Theresa McGee like they did in the first trial. /s/ WTH]

37. Again, the State relied heavily on Cindy Johnson, who was the State's first witness. Exhibit 37.

[GRANTED]/~~DENIED~~

a. Jones: "Did he reach for any type of weapon?" Johnson: "I didn't see him reach for anything."

Id. at 476.

[GRANTED]/~~DENIED~~

b. Johnson testified that she did not remember telling police that Shaffer pulled his gun. *Id.* at 506-08; 514.

[GRANTED]/~~DENIED~~

38. The questioning during Johnson's testimony also reveals that Henry Ishman's true name had not been revealed:

~~GRANTED~~/[DENIED]

a. By defense counsel Lane:

"Q. Who was in the store when you left?

A. Mr. Shaffer and Theresa.

> Q. Did you have an opportunity to see Theresa at that time? . . . ."

Id. at 497.

[GRANTED]/~~DENIED~~

b. And again by Jones on re-direct:

> ***"Q. Where was Theresa McGee when the shooting first started?***
>
> ***A. She was somewhere in the kitchen. I'm not sure where exactly she was at.***

Id. at 501.

[GRANTED]/~~DENIED~~

c. Finally, by defense counsel Lane on re-cross:

> "A. The girl that was employed there, her name was Theresa.
>
> Q. And she was the only other girl that was employed there on that day?
>
> A. Yes."

Id. at 506.

[GRANTED]/~~DENIED~~

39. Examination of the paramedic who testified also shows that defense counsel had not been informed of Henry Ishman's true name:

> Question by Scott: ***"Q. Would you recall the name of Theresa McGee as being the person who was in the store possibly?"*** Exhibit 39 at 520 (emphasis added).

~~GRANTED~~/[DENIED]

40. Defense counsel also examined Dean McDaniels, the owner of the store that had been robbed, about the whereabouts of "Teresa McGee." Mr. McDaniel's answer also indicates that he was aware, [and] did [ ] disclose, [that Teresa McGee went by two or three names. /s/ WTH.] Exhibit 40.

> [Questioning by Lane] "Q. Who all was there at the time you arrived [at the scene]?
>
> A. There was one of my employees from the other store had come down and then two other employees of Joseph's that normally work behind the delicatessen, one white lady and one black lady were on duty and they were in the store.
>
> ***Q. What were there*** [sic] ***names, please, sir?***
>
> ***A. Theresa something was the black girl's name. I can't remember her last name, McGee or something. She went by two or three names I found out later***. And the other girl was Cindy Johnson, I believe. The name has escaped me. I believe its Johnson."

Id. at 531-32.

[GRANTED]/~~DENIED~~

41. In closing arguments on February 23, 1982, the State again relief heavily on the testimony of Cindy Johnson. Exhibit 41.

[GRANTED]/~~DENIED~~

> a. While discussing the Court's instruction o accomplice testimony, Jones argued – "Surely the

fairest way to go about it is just take the accomplice's testimony and temporarily set it aside and look at all the rest of the evidence." *Id.* at 7.

[GRANTED]/~~DENIED~~

b. Defense counsel was forced to attack Johnson's testimony: [By Scott] "She recanted in her statement about certain items contained in her statement. . . . she was still not totally honest with you . . . ." *Id.* at 15.

[GRANTED]/~~DENIED~~

42. Again the defense relied on the theory that Williams had killed independently from Nichols.

[GRANTED]/~~DENIED~~

a. The defense argument is at exhibit 42 at 17-19; 26. For example:

[GRANTED]/~~DENIED~~

i. "But then [Williams] goes back in the store, back in the store after the attempted robbery has terminated. He goes back in." *Id.* at 18.

[GRANTED]/~~DENIED~~

ii. "Willie Ray Williams acting independently, independently goes back in and commits the offense of a murder." *Id.* at 19.

[GRANTED]/~~DENIED~~

b. The State [countered] the argument:

[GRANTED]/~~DENIED~~

i. "In effect what the defense is saying, Willie did all of this and that either the murder was not done to help the original plan of the robbery, or that this is an offense that the defendant was not

required or should not have anticipated." *Id.* at 9-10.

[GRANTED]/~~DENIED~~

ii. "Basically the defense is that Jo Jo ran out of the store before the murder. All of this is Willie's doing, that Willie went back to get the gun. See, it can't be the object of the original conspiracy. . . ." *Id.* at 33.

[GRANTED]/~~DENIED~~

c. Part of the argument presented by the defense was that Nichols could not have anticipated that the decedent would have a gun that Williams would want to steal.

[GRANTED]/~~DENIED~~

i. "And, you say, well, Joseph should have anticipated that as the law would require. Well, should you, if you don't even know a man has got a gun in that store. . . . So there is no knowledge that a gun was there. And Willie decided, I'm not going back there to rob him for what we intended to do, go get money. I'm going to come back in and get the gun the man has." *Id.* at 19-20.

[GRANTED]/~~DENIED~~

ii. "That murder was the result of an independent impulse by Willie Ray Williams who went into the store and you heard his testimony to get the gun and he shot the man." *Id.* at 25.

[GRANTED]/~~DENIED~~

c. To complete its counter-argument, the State argued that Nichols fired the fatal shot, and to

prove that relied on Johnson's testimony almost exclusively:

[GRANTED]/~~DENIED~~

> i. "I'll ask you to apply the same rule of common sense to the State's witnesses. ***Start with Cindy Johnson***. Cindy told you . . . They began firing. When they pulled their guns, Mr. Shaffer did this. He was scared. If I point a loaded gun in your face, you would duck. . . . In her testimony on the stand she said Mr. Shaffer did not have a gun. [mentions statement – contrary testimony]. . . . The evidence is he did not have a gun.
>
> [Lane objects not in evidence. Court overrules]
>
> Mr. Jones: It's right here. You can have it read to you. You can read it to yourselves aloud. That's why I offered it. . . . That's what this trial is all about. ***That's why this man is not going to slip through the cracks, because he is a killer***. That man sat right where you're sitting and he pointed a gun and he fired it. That bullet went into the back of this man's back and blew him over in a pool of blood. And I'll tell you that is [sic] was his [Nichols'] hand that did the killing. ***How do you know that? Cindy saw it. She told you. . . .*** "

Id. at 37-39 (emphasis added).

[GRANTED]/~~DENIED~~

ii. "She [Cindy Johnson] told you Mr. Shaffer did not have a gun. Both defendants ran to the door. ***She [Cindy Johnson] ran to the back and stood back there with another woman that was back there Theresa McGee, whatever her name is."***

Id. at 39-40 (emphasis added).

[GRANTED]/~~DENIED~~

iii. "Why would she want to lie to you?"

Id. at 40.

[GRANTED]/~~DENIED~~

43. The closing argument of A.D.A. Jones conclusively demonstrates that Henry Ishman's true identity had not been revealed:

> "She [Cindy Johnson] told you Mr. Shaffer did not have a gun. Both defendants ran to the door. ***She [Cindy Johnson] ran to the back and stood back there with another woman that was back there, Theresa McGee, whatever her name is."***

Exhibit 43 at 39-40.

~~GRANTED~~/[DENIED]

44. Following the argument, on February 23, 1982, the jury began its deliberations, which clearly focussed [sic] on Johnson's testimony and the defense's independent impulse argument:

[GRANTED]/~~DENIED~~

a. At 3:59 p.m., the jury requested all exhibits but the weapons, and all of the testimony of Williams, Johnson, and Rivera. Exhibit 44 at 80.

[GRANTED]/~~DENIED~~

b. At 4:12, the Judge instructed the jury that it must be more specific on the testimony it wanted, to which they [sic] jury replied, "Cindy Johnson testimony starting with when gun was pulled." *Id.* at 82.

[GRANTED]/~~DENIED~~

c. Following further instruction, the jury again stated that it wanted to review "Cindy Johnson's description of the shooting. . . ." *Id.* at 85.

[GRANTED]/~~DENIED~~

45. On February 24, 1982, the jury returned a guilty verdict. Exhibit 45.

[GRANTED]/~~DENIED~~

46. During closing arguments in the punishment phase, whether Shaffer had a gun was again a critical issue, and Johnson was again the critical witness on that point. Exhibit 46.

[GRANTED]/~~DENIED~~

a. The defense attacked Johnson's testimony as inconsistent. *Id.* at 12-15.

[GRANTED]/~~DENIED~~

b. The State argued back: "Provocation? What provocation? What did Claude Shaffer, Jr., do to provoke this man except duck?" *Id.* at 54.

[GRANTED]/~~DENIED~~

APPENDIX D

Cause No. 323836-B

Ex parte	§	In the 178th District Court of
	§	
Joseph Bennard Nichols	§	Harris County, Texas

ORDER ON NICHOLS' PROPOSED CONCLUSIONS OF LAW AND MIXED QUESTIONS OF LAW AND FACT

(Filed April 9, 2001)

The Court makes the following conclusions of law and mixed questions of law and fact:

Conclusions of Law

1. The general rule

"The Texas Court of Criminal Appeals has articulated a three-part test to determine if the accused has made out a valid *Brady* claim: (1) the State must suppress or withhold evidence; (2) that is favorable to the accused; and (3) that is material to the defense." *Flores v. State*, 940 S.W.2d 189, 190 (Tex.App. – San Antonio 1996) (*citing*, *Ex parte Kimes*, 872 S.W.2d 700, 702-03 (Tex.Crim.App. 1993)). Application of this legal standard is a mixed question of law and fact. *Smith*, 50 F.3d at 827 ("The state court's ultimate conclusions under *Brady* . . . is not entitled to a presumption of correctness under section 2254(d) and is open to review by federal courts.") (citations omitted).

[GRANTED]/~~DENIED~~

2. The State or Prosecution

> The term "State" or "'prosecution' for *Brady* purposes encompasses not only the individual prosecutor handling the case, but also extends to the prosecutor's entire office, as well as law enforcement personnel and other arms of the state involved in investigative aspects of a particular criminal venture." *Smith v. Secretary of New Mexico Dept. of Corrections*, 50 F.3d 801, 824 (10th Cir. 1995); *see also Giglio v. United States*, 405 U.S. 150, 154 (1972) ("The prosecutor's office is an entity . . . . "); *United States v. Endicott*, 869 F.2d 452, 455 (9th Cir. 1989); *United States v. Buchanan*, 891 F.2d 1436, 1440 (10th Cir. 1989) ("Knowledge by police or investigators is therefore imputed to the prosecution."), *cert. denied*, 494 U.S. 1088 (1990).
>
> The prosecutor contends that because he was not in possession of the rap sheet and was unaware of its existence, he cannot be held responsible for suppressing evidence under *Brady*. This argument is unpersuasive . . . The duty to produce requested evidence falls on the state; there is no suggestion in *Brady* that different arms of the government are severable entities.

Martinez v. Wainright, 621 F.2d 184, 186 (5th Cir. 1980) (citations omitted).

> The prosecution challenges the first element, insisting that it could not withhold or suppress evidence unknown to it. That the prosecutor, because of a shortness of time chose not to run a FBI or NCIC check on the witness, does not change

'known' information into 'unknown' information within the context of the disclosure requirements.

United States v. Auten, 632 F.2d 478, 481 (5th Cir. 1980).

[GRANTED]/~~DENIED~~

3. Disclosure/Suppression

a. Bad faith not required.

"The term 'suppression,' in the *Brady* context, does not require a finding of bad faith on the part of the prosecutor." *Smith v. Secretary of New Mexico Dept. of Corrections*, 50 F.3d 801, 824 (10th Cir. 1995) (citations and footnote omitted). "In *Brady v. Maryland* . . . , the United States Supreme Court held that the suppression by the prosecution of evidence favorable to the accused violates due process where the evidence is material to guilt or punishment, *irrespective of the good faith or bad faith of the prosecution*." *Flores v. State*, 940 S.W.2d 189, 190 (Tex.App. – San Antonio 1996) (*citing*, *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (emphasis supplied); *see also Smith v. Phillips*, 455 U.S. 209, 219 (1982) ("[T]he touchstone of due process analysis in cases [alleging a *Brady* violation] is the fairness of the trial, not the culpability of the prosecutor.").

Indeed, it is irrelevant to [sic] for *Brady* purposes "whether the nondisclosure was a result of negligence or design." *Giglio v. United States*, 405 U.S. 150, 154 (1972)

[GRANTED]/~~DENIED~~

b. The State's opening of its file is not dispositive. [copy struck by /s/ WTH]

The State's primary defense to Mr. Smith's claims were that the evidence was made

> available pursuant to the district attorney's 'open file' policy, that the evidence was not withheld intentionally, or that the prosecutors did not have knowledge the evidence existed. Because these issues are largely irrelevant to *Brady* analysis, it follows that the State has not offered a legitimate defense to Mr. Smith's claims.

Smith, 50 F.3d at 828. *See also Flores*, 940 S.W.2d at 191. In *Flores*, defense counsel was allowed to peruse the State's file, but the Court ruled that "[e]ven if Flores' trial counsel had ample opportunity to review the State's file, which contained a copy of the written statement, the fact remains that the State never told the defense about Casanova's verbal statement made on the day before trial. Casanova told the prosecutor more on the day before trial than she told the police in her written statement, and even an exhaustive review of the State's file would not have revealed the additional information learned by the prosecution on the day before trial." 940 S.W.2d at 191.

[GRANTED]/~~DENIED~~

c. The State has affirmative duty to disclose *Brady* material.

In addition, there is no obligation by a defense counsel to repeatedly review a file or to repeatedly request such a review. Instead, the State has an "affirmative duty to disclose evidence" under *Brady*. *Kyles v. Whitley*, 514 U.S. 419, 432 (1995). "When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." *United States v. Agurs*, 427 U.S.

97, 106 (1976) (emphasis added), *quoted and followed in, Thomas v. State*, 841 S.W.2d 399, 403 (Tex.Crim.App. 1992).

The Texas cases on "open files" comport with the general rule and do not allow a defendant's constitutional rights to be side-stepped by burying evidence in file; in particular a defendant cannot be expected to ask for information that it has no reason to believe exists. *See Collins*, 642 S.W.2d at 86 (addressing a "lack of request for such information (particularly where defense counsel has no reason to suspect the existence of such evidence). . . . ").

[GRANTED]/~~DENIED~~

4. Materiality as to Guilt or Innocence

Brady v. Maryland requires the disclose of evidence material to either guilt or punishment. 373 U.S. at 87.

[GRANTED]/~~DENIED~~

5. Materiality when defendant did not request the information withheld

a. The "reasonable probability" standard governs general discovery requests.

If a defendant makes only a general request for exculpatory evidence, and not a specific request for the information in question, the general, and most stringent, standard for materiality applies, which is as follows: "Evidence is material if a reasonable probability exists that, had it been disclosed, the result of the proceeding would have been different." *Flores*, 940 S.W.2d at 191 (*citing*, *United States v. Bagley*, 473 U.S. 667, 682 (1985); *Harris v. State*, 827 S.W.2d 949, 958 (Tex.Crim.App.), *cert. denied*,

506 U.S. 942 (1992)); *see also Guerra v. Johnson*, 90 F.3d 1075, 1078 (5th Cir. 1996).

[GRANTED]/~~DENIED~~

b. "Reasonable probability" defined.

"A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Id.* (*citing*, *Bagley*, 473 U.S. at 682).

[GRANTED]/~~DENIED~~

c. Materiality does not require proof of a different result.

c. "[A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal. . . . " *Kyles v. Whitley*, 115 S.Ct. 1555, 1566 (1995). The Supreme Court in *Agurs*, "rejected a standard that would require the defendant to demonstrate that the evidence if disclosed probably would have resulted in acquittal." *Id.* (citations omitted). As the Court explained,

> The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a Brady violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

Id. (footnote omitted).

[GRANTED]/~~DENIED~~

6. Materiality when a specific request for information has been made

a. Specific requests are governed by a "might have" test.

If the defendant makes a specific request for certain information, the standard is lower – the defendant need only show that the information ***might have*** produced a different result. "According to *Brady*, if he makes a specific request [for certain information], he need only show that the information might have produced a different result." *Lindsey v. King*, 769 F.2d 1034, 1041 (5th Cir. 1985).

Although a plurality opinion of the United Stats Supreme Court delivered in 1985 has created some confusion about the lesser standard for cases involving a specific request for information, the courts, including the Fifth Circuit, continue to require a lesser showing of materiality when a more specific request for information has been made. *See United States v. Bagley*, 105 S.Ct. 3375 (1985). Following *Bagley*, the Fifth Circuit stated, "Viewing the [*Brady*] opinions as a whole, it is fair to say that all the participating Justices agreed on one thing at least: that ***reversal for suppression of evidence by the government is most likely where the request for it was specific***. . . . " *Lindsey*, 769 F.2d at 1041 (emphasis added). Analyzing the same cases, other courts have held that the Supreme Court in *Bagley* adopted a "flexible, sliding scale approach to assessing the materiality *vel non* of the evidence in question, [by which] the specificity of the request in inversely related to the prosecutor's disclosure obligation. ***As the specificity of the defendant's request increases, a lesser showing of***

materiality will suffice to establish a violation. *Smith*, 50 F.3d at 827.

[GRANTED]/~~DENIED~~

b. Failures related to specific requests are rarely, if ever, excused.

In short, as enunciated by the United States Supreme Court, ***"When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable."*** *United States v. Agurs*, 427 U.S. 97, 106 (1976) (emphasis added), *followed in*, *Smith*, 50 F.3d at 828.

[GRANTED]/~~DENIED~~

c. Specific v. general requests.

A general request has been characterized by the United States Supreme Court as "really . . . no better notice that if no request is made." *Agurs*, 427 U.S. at 106-07. "In contrast, a specific request gives 'the prosecutor notice of exactly what the defense desires.'" *Chaney v. Brown*, 730 F.2d 1334, 1341 (10th Cir. 1984) (*citing*, *Agurs*, 427 U.S. at 106-07).

The determination of whether a request is specific or general is a mixed question of law and fact, which is reviewable *de novo*. *Id.* at 1341 n.10.

[GRANTED]/~~DENIED~~

d. Subsequent discussions can turn a general request into a specific request.

d. A general request for information can be made more specific by subsequent discussions and requests. *Scurr v. Niccum*, 620 F.2d 186, 188, 190 (8th Cir.

1980); *see also Chaney*, 730 F.2d at 1343 n.12. As explained by the Eighth Circuit.

> [A] request for disclosure of particular information cannot be labeled as either 'specific' or general in a vacuum. Rather, the question must be asked whether, under all the circumstances presented by the case, the request was such as give [sic] the prosecutor reasonable notice of what the defendant desired.

Id.

[GRANTED]/~~DENIED~~

8. Materiality if State allows knowingly false testimony

If the State failed to correct false testimony, namely the testimony that the witness' name was McGee and that she could not be found, then "this case [is] governed by *Napue*, which held that the prosecution may not knowingly fail to correct information that it knows to be false. Under such circumstances, the nondisclosed evidence ***would be presumptively material unless the State demonstrates the nondisclosure was harmless error.***" *Smith*, 50 F.3d at 831 (emphasis added) (*citing*, *Napue*, 360 U.S. at 269; *Agurs*, 427 U.S. at 104.)

~~GRANTED~~/[DENIED]

9. Materiality – Opinion of the Court or State

a. Jury should determine credibility of witness.

"It [is] for the jury . . . to decide whether the [evidence was] credible. . . . " *Lindsey v. King*, 769 F.2d 1034, 1040 (5th Cir. 1985).

[GRANTED]/~~DENIED~~

b. Court must accept witness' testimony about the crime.

This Court must accept the version of the facts of the offense as presented by Teresa Henry Ishman in her testimony. *Clark v. Blackburn*, 632 F.2d 531, 534 (5th Cir. 1980) ("While the magistrate may have been correct in finding that Calvin Clark is not a credible witness, this determination was not one for him to make, and it certainly is not one for this Court to make.") (footnote omitted).

[GRANTED]/~~DENIED~~

c. State's or prosecutors' view of witness' credibility is irrelevant.

That the State may believe that a witness' testimony was and is not material "is quite beside the point: It was for the jury, not the prosecutor, to decide whether the [evidence was] credible. . . . " *Lindsey v. King*, 769 F.2d 1034, 1040 (5th Cir. 1985). If the prosecution was allowed to make such determination, they "might, on a claim that they thought it unreliable, refuse to produce any matter whatever helpful to the defense, thus setting *Brady* at nought. Such an explanation is laughable, offering it is an effrontery. It does not wash, nor do we believe for a moment that the prosecutor could have been so simple-minded as to have believed it would." *Id.*

[GRANTED]/~~DENIED~~

10. Due Diligence of Defense Counsel is irrelevant.

The Texas Court of Criminal Appeals has expressly rejected the argument that a lack of due diligence by defense counsel defeats a *Brady* claim.

> [R]eversible error is also committed where the prosecutor negligently or inadvertently fails to disclose evidence which may exonerate the accused or which may be of material importance to the defense, . . . ***even though the accused's counsel is not diligent in his preparation for trial.***

Means v. State, 429 S.W.2d 490, 494 (Tex.Crim.App. 1968) (emphasis supplied); *see also Ham v. State*, 760 S.W.2d 55, 58 (Tex.App. – Amarillo 1988, no pet.h.) ("It is well established that reversible error is presented where a prosecutor negligently or inadvertently fails to disclose evidence . . . even though the accused's counsel is not diligent in his preparation for trial, with the focus being upon the essential fairness of the procedures and not on the astuteness of either counsel."); *Collins v. State*, 642 S.W.2d 80, 86 (Tex.App. – Fort Worth 1982, no pet. h.).

The *Collins* opinion is similar to this action because in both actions, the State had the witness in custody for a relevant period, so that an interview of the witness would have been easy:

> In the instant case, we will not allow the State to escape its duty to disclose evidence favorable to an accused (who has requested it and obtained a discovery order) through the State's assertion that the accused failed to exercise due diligence . . . Diligence is required to avoid undue delay in the judicial process. In this case, a protracted search for the witness was unnecessary. Ms. Faulkner was in prison in Gatesville, and Mr. Worley, the prosecutor, knew exactly where she could be found. . . .

Collins, 642 S.W.2d at 86.

[GRANTED]/~~DENIED~~

Mixed Questions of Law and Fact

1. **The State knew Teresa Henry Ishman's True Name and Location.**

[GRANTED]/~~DENIED~~

a. There is no dispute that the State knew the witness' true name was Teresa Henry, that she had been arrested and delivered to Bogalusa, Louisiana, and that she was living in Bogalusa, Louisiana.

[GRANTED]/~~DENIED~~

b. In fact, on at least ***three separate occasions*** prior to Nichols' conviction, the State located Ms. Henry Ishman: A.D.A. Burdette interviewed her; the Harris County Sheriff's Department arrested and extradited her, and A.D.A. Jones' investigator located her in Bogalusa just before the second trial. See findings of fact 3, 4, 34. All of this information is imputed to the State. See conclusion no. 2.

[GRANTED]/~~DENIED~~

c. Moreover, for a relevant period of time, the State had Ms. Henry Ishman in custody and placed her in the hands of Louisiana police. The State, therefore, knew she was likely under court supervision in Bogalusa, Louisiana. See findings of fact 3 and 4.

~~GRANTED~~/[DENIED /s/ WTH]

2. **The State knew that the [witness Teresa McGee could not be served with a subpoena at the address listed on the application for subpoena.** /s/ WTH]

[GRANTED]/~~DENIED~~

3. **The State knew the substance of Teresa Henry Ishman's testimony.**

GRANTED/DENIED

a. As further explained in fact findings 3 and 4, there is [copy struck by /s/ WTH] dispute that the State knew what Ms. Henry Ishman claimed to see and how she would testify, including that the deceased pulled a gun prior to shots being fired, the decedent pull a gun before any defendant (Williams or Nichols) fired their weapons and that the other eyewitness, Ms. Cindy Johnson, could not have seen the fatal shots being fired, because she was hidden in the bathroom when the shooting started.

[GRANTED]/~~DENIED~~

b. This finding and conclusion is compelled by the testimony of Ms. Henry Ishman, Judge Burdette, and Ron Mock. Ms. Henry Ishman testified that she told A.D.A. Burdette exactly what she saw. Judge Burdette could not remember the interview, so could not dispute Ms. Henry Ishman's testimony. Ron Mock, however, remembers, A.D.A. Burdette telling Mock, as counsel for Willie Ray Williams, that there was a second woman who saw the shooting, which could only be Ms. Henry Ishman. Mock did not tell Nichols' counsel about Ms. Henry Ishman.

~~GRANTED~~/[DENIED]

4. The State did not disclose the true name and location of Ms. Henry Ishman.

[GRANTED]/~~DENIED~~

a. Again, it is conceded that the State never affirmatively informed defense counsel about the mistake in Ms. Henry/Ishman's name and address.

[GRANTED]/~~DENIED~~

b. A.D.A. Jones states that he did not know about Ms. Ishman's name and location until just before Nichols' second trial, [copy struck by /s/ WTH]

[GRANTED]/~~DENIED~~

c. The State's only argument that it provided the defense counsel with the witness' true name and location is the purported proffer of the State's file in the midst of Nichols' second trial. [copy struck by /s/ WTH] *See, e.g.*, finding 49.

[GRANTED]/~~DENIED~~

d. As shown in conclusion no. 3b, merely placing the information in the file did not fulfill the State's obligations.

~~GRANTED~~/[DENIED]

5. The State failed to reveal the substance of Ms. Henry Ishman's testimony.

It is uncontroverted that defense counsel was never informed of the substance or importance of Ms. Henry Ishman's testimony.

~~GRANTED~~/[DENIED]

6. The State also failed to fulfill its promise to provide any new information to the defense.

As shown in findings nos. 12 and 14, in order to avoid more specific discovery orders, the State in this case repeatedly represented to the trial court that it would "show" defense counsel any new information "as soon as" it was received. For example:

(1) "If that exists, when I receive it, I will be happy to give a copy to the defense." PE 14 at 20.

(2) "Yes sir, when I have one made I will be happy to show them." *Id.* at 24.

(3) I'll bring it over to the courtroom and let them look at it." *Id.* at 25.

(4) ***"The minute the evidence comes in I'll show it to the Court as soon as I get my hands on it and advise the Court. The Court: All right. So them [sic] that the counsel can be advised of it also."*** *Id.* (emphasis added).

(5) " . . . we will give a copy if this exists to the defense." *Id.* at 31.

(6) "Should I discover any other photographs used for that sort of thing I will show them the photographs." *Id.* at 33.

(7) " ***. . . I don't know of any and should I find them or come to my attention [sic] I certainly will show them to the defense."*** *Id.* at 33 (emphasis added).

(8) "If there are any photographs in there we'll show them to the defense. ***As to any other witnesses should they become available we'll show them to the defense."*** *Id.* at 34.

(9) " . . . as to any other offenses I know of none at this time but should they become available I'll show them to the defense. The Court: ***Then the Court will make no further ruling on the matter at this time."*** *Id.* at 35 (emphasis added).

(10) " ***. . . if they become available I'll show them to the defense as soon as I recover them."*** *Id.* at 36.

As to witness information in particular, A.D.A. Jones indicated that the State would provide that information through its subpoena list, stating explicitly "and we'll amend thereto. . . . " *Id.* at 37; *see also id.* at 35-38; PE 15 at 15-16.

[GRANTED]/~~DENIED~~

7. Defense counsel made a specific request for Ms. Henry Ishman's name and location.

~~GRANTED~~/[DENIED /s/ WTH]

a. It would have been difficult for defense counsel to have done more to apprise the State that they wanted to know the name and location of Ms. Henry Ishman. The [sic] specifically requested her name and location, moved for a continuance to find her, forced the State to put on (false) evidence from Officer Earl that she could not be found, and asked witnesses about her location during trial.

~~GRANTED~~/[DENIED]

b. Defense counsels' repeated requests for that information were as specific as possible. In *Chaney*, the court held that a request for, *inter alia*, the "names and addresses of all persons who may have some knowledge of the facts involved in this case" was a specific request, because it was as specific as the defense could make it "without knowing the identity of . . . the witnesses . . . . " *Id.* at 1342. The Court continued: "The Court in *Agurs* explained that general requests merely ask for 'all *Brady* material' or for 'anything exculpatory.' Chaney's request is more specific. . . . " *Id.* (citations omitted).

~~GRANTED~~/[DENIED]

c. In this case, The repeated requests here are far more specific still. The State was well apprised by defense counsel that the name and location of the missing witness was needed and considered exculpatory. The defense repeatedly asked for information regarding witnesses, and inquired of many of the trial witnesses about the missing witness. In addition, the defense specifically asked for a continuance to find what it described as material witness, and the State was compelled to put on

evidence that the witness could not be found (at a time when the witness' true identity was known).

~~GRANTED~~/[DENIED]

d. Brad Beers, the second-chair prosecutor at Nichols' first trial, testified that the State knew the defense was looking for Ms. Henry Ishman and considered her a material witness. Transcript, vol. 2, at 32-33. Beers further testified that, had he been aware that Teresa's real name was Henry and that she had relocated to Louisiana, he would have informed the defense. *Id.*

[GRANTED]/~~DENIED~~

8. **Ms. Ishman's testimony is** [copy struck by /s/ WTH] **and material.**

[GRANTED]/~~DENIED~~

a. Nichols' meets even the most stringent general standard at the guilt/innocence stage because, *inter alia*:

(1) Teresa Henry Ishman impeaches the State's main witness and only eyewitness. Cindy Johnson. In fact, the jury was apparently focused on Ms. Johnson's testimony, evidenced by the jury's request to review her testimony.

(2) Teresa Henry Ishman testifies that the shot fired by Nichols was provoked by Shaffer, which supports the defense that the killing was not planned and that Williams' re-entry and shooting was an independent crime.

~~GRANTED~~/[DENIED]

b. Nichols clearly meets even the most stringent general standard in the punishment phase because, *inter alia*:

(1) The jury's deliberation focused on whether the decedent pulled his gun, and issue on which Teresa Henry Ishman was an eyewitness. This is demonstrated by the jury's two questions during its deliberations.

(2) The material chance of a different verdict is also empirically demonstrated by the mistrial in Nichols' first trial.

~~GRANTED~~/[DENIED]

c. Evidence that corroborates a defendant's version of the facts is material and favorable: "Logic dictates that evidence from a disinterested witness corroborative of the defendant's version of events would be favorable to the defendant." *Flores*, 940 S.W.2d at 192.

[GRANTED]/~~DENIED~~

d. The ability to use Ms. Henry Ishman's testimony to impeach Cindy Johnson also makes her true identity and location favorable and material:

(1) "Impeachment evidence . . . falls within the Brady rule. Such evidence is 'evidence favorable to an accused, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal." *United States v. Bagley*, 473 U.S. 667, 676 (1985) (citations omitted).

(2) The fact that the State's main witness, and sole eyewitness, would have been impeached by Ms. Henry Ishman makes her testimony material under any standard. This conclusion is supported by the expert testimony of Mr. Henry Oncken and the Court's experience. Experience dictates that when two witnesses contradict themselves, there is a far greater likelihood of acquittal. So, although a

jury might have been able to convict Nichols based on Cindy Johnson's testimony, any impeachment of her would have materially aided Nichols' defense. Such knowledge is so common that the Fifth Circuit has taken judicial notice of it. *See Lindsey*, 769 F.2d at 1042.

~~GRANTED~~/[DENIED]

e. The State is judicially estopped to deny the materiality of Ms. Henry Ishman's testimony. In accordance with Article 24.03 of the Texas Code of Criminal Procedure, Ira Jones swore in the subpoena application "that the testimony of said witness [Ms. "McGee"] was believed to be material to the State." Exhibit 16. That sworn statement constitutes "a prima showing of materiality." *Coleman v. State*, 915 S.W.2d 80, 86 n.6 (Tex.App. – Waco 1996, no writ) (*citing*, George E. Dix & Robert O. Dawson, Criminal Practice and Procedure § 27.53).

~~GRANTED~~/[DENIED]

9. The State did not correct knowingly false testimony.

a. The State knew that the actual name of the witness known as Teresa "McGee" was Teresa "Henry" and that the name and address in its subpoena list was inaccurate.

[GRANTED]/~~DENIED~~

b. The State also proffered the testimony of Investigator Earl and the testimony of Mr. McDaniels, both of whom incorrectly identified the witness the State knew to be Teresa Henry Ishman. Officer Earl in particular testified as to Ms. "McGee's" last-known address, which the State clearly knew was incorrect.

~~GRANTED~~/[DENIED]

c. Since the State failed to correct that testimony when it learned that it was false (at least when A.D.A. Jones learned of Ms. Henry Ishman's real name and location just before Nichols' second trial), this Court is required under *Napue* to presume that Ms. Henry Ishman's testimony would have been material unless the State demonstrates the nondisclosure was harmless error, which the State has not done.

~~GRANTED~~/[DENIED]

Signed: April 9, [copy struck by /s/ WTH] 2001

/s/ William Harmon
Judge Presiding

APPENDIX E

CAUSE NO. 323836-B

EX PARTE	§	IN THE 178TH
	§	DISTRICT COURT
	§	
	§	OF
	§	
JOSEPH BERNARD	§	HARRIS COUNTY,
NICHOLS,	§	TEXAS
Applicant	§	

RESPONDENT'S PROPOSED FINDINGS OF FACT

CONCLUSION OF LAW AND ORDER

(Filed April 9, 2001)

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CAUSE NO. 323836-B

EX PARTE	§	IN THE 178TH
	§	DISTRICT COURT
	§	
	§	OF
	§	
JOSEPH BERNARD	§	HARRIS COUNTY,
NICHOLS,	§	TEXAS
Applicant	§	

RESPONDENT'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Having considered the application for writ of habeas corpus in cause no. 323836-B, the pleadings filed by the applicant and Respondent in cause no. 323836-B, the testimony elicited during the 1997 writ evidentiary hearing, the Court documents and official court records in the above said cause, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On March 10, 1982, the applicant was convicted by a jury in the 178th District Court of Harris County, Texas, for the felony offense of capital murder in cause no. 323836 and sentenced to death.

2. The applicant had been previously charged with and indicted for the offense of capital murder in cause number 323836; however, the applicant's first trial ended in a mistrial on July 30, 1981.

3. Counsel Ray Dickens, Neil Lane and Robert Scott represented the applicant at his first trial in cause number 323836.

4. Counsel Robert Scott and Neil Lane represented the applicant at his second trial in cause number 323836, the action upon which applicant's habeas proceeding is based.

5. On April 13, 1988, the Court of Criminal Appeals affirmed the applicant's conviction in cause no. 323836. **Nichols v. State**, 754 S.W.2d 185 (Tex. Crim. App. 1988).

6. On January 9, 1898, the United States Supreme Court denied the applicant's petition for writ of certiorari. **Nichols v. Texas**, ___ U. S. ___, 109 S. Ct. 819 (1989).

7. On May 23, 1989, the applicant filed his initial state application for writ of habeas corpus, cause number 323836-A, to which the State responded.

8. In October and November, 1990, the trial court held an 11.07 evidentiary hearing. At the conclusion of the writ hearing, the trial court recommended that habeas relief be denied.

9. On December 12, 1991, the Court of Criminal Appeals denied the applicant habeas relief on his initial state application for writ of habeas corpus, cause number 323836-A (writ number 21,253-01).

10. On August 31, 1992, after a federal evidentiary hearing, the federal district court granted federal habeas corpus relief in part and denied federal habeas relief in part. **Nichols v. Collins**, 802 F.Supp. 66 (S.D. Tex. 1992).

11. On November 20, 1995, the Fifth Circuit Court of Appeals reversed the federal district court's granting of habeas relief and affirmed the federal district court's denying of habeas relief. **Nichols v. Scott**, 69 F.3d 1255 (5th Cir. 1995).

12. On June 24, 1996, the United States Supreme Court denied the applicant's petition for writ of certiorari. **Nichols v. Johnson**, ___ U.S. ___, 116 S. Ct. 2559 (1996).

13. On December 23, 1996, the applicant filed a subsequent state petition for writ of habeas corpus, cause no. 323836-B, and a motion to disqualify the Honorable

William Harmon from hearing any subsequent habeas proceedings.

14. On April 16, 1997, the Court of Criminal Appeals issued an order remanding the case to the trial court to address the applicant's habeas claim that the State suppressed material, exculpatory evidence, specifically the name and location of Theresa McGee aka Teresa Henry aka Teresa Ishman.

15. Upon the Respondent's motion, the Court of Criminal Appeals issued a revised order on April 30, 1997, stating that "it is the Court's belief that the requirements of art. 11.071, § 5(a), have been satisfied, but only as to the specific claim that the State suppressed material, exculpatory evidence, specifically the name and location of Ishman, in that this particular claim has not been and could not have been presented previously because the factual basis for the claim was unavailable."

[Copy struck by /s/ WTH]

Evidence at the Applicant's Trial and Written Statements

22. During the applicant's trial, Charlotte Parker testified that she, along with Evelyn Harvey, drove the applicant and Willie Williams to Fannin Street on October 13, 1980; that the applicant's express intent was to rob a store; that the applicant and Williams exited the car and entered a store; that she then heard two shots; that Williams, who was carrying a gray box and a gun, ran from the store to the car; that she picked up the applicant, who was carrying a gun and standing outside the store; and, that the applicant said that he had fired the first shot

and he thought he had shot the man in the chest (R. XXVI-861-878)[1].

23. During the applicant's trial, Evelyn Harvey testified that the applicant, after the offense, admitted shooting the complainant in the chest (R. XXVI-761-763).

24. During the applicant's trial, Cindy Johnson, an employee of Joseph's Delicatessen, testified that she saw two men with guns enter the store; that the man with the lighter complexion, whom she tentatively identified as the applicant, fired the first shot then the other man fired; that she saw blood on the right side of the complainant's head and on his left side; that the complainant, who never had a gun in his hand, collapsed and fell to the floor; and, that Johnson ran to the back of the kitchen after both men ran to the door; and, that Johnson then heard someone re-enter the store, fire a shot, and then leave (R. XXV-470-503).

25. During the applicant's trial, Cindy Johnson further testified that she saw the complainant's gun under the counter after the offense; that that gun was underneath the shelf under the cash register where it always was; that the gun was not around the complainant's body on the floor or in his hand after she came from the back; that the complainant did not have a chance to get to his gun; and, that she did not see the gun in the complainant's hand (R. XXV-480-486).

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[1] The following citations will be used throughout the findings of fact and conclusions of law: the applicant's trial – (R. Vol. Page); Willie Williams' trial – (WW Vol. Page); 1997 writ evidentiary hearing – (WH Vol. Page).

26. The Court finds that Cindy Johnson also gave a written statement on October 13, 1980, after the offense and prior to the applicant's trial, in which she stated that both of the men entered the store and walked to the cash register; that one of the men pulled a gun and said something; that the complainant reached for the gun which he kept under the counter; that both of the men shot the complainant and both started running out the door before they got any money; that one of the men came back and grabbed a box with change in it and ran out; that she heard another shot when the man ran out but she did not see him shoot; that she ran to the back of the store right after the complainant was shot and fell to the floor; and she ran to the other store on Fannin after she heard the men leave where the people called the ambulance and the police.

27. The Court further finds, that during cross-examination, trial counsel attempted to impeach Cindy Johnson's testimony at trial with the portion of her written statement concerning the complainant reaching for his gun; that Johnson testified that she did not remember saying in her statement that the complainant reached for his gun; that she did not intentionally lie to the police; that she made a mistake when she made her written statement; and, that she was sure that the complainant did not reach for his gun (R. XXV-506-508, 514).

28. During the applicant's trial, David Leahmann, Houston Fire Department paramedic, testified that he arrived at the scene of the offense prior to the police; that there were no weapons around the complainant's body; that there was one weapon underneath the counter close to the cash register; that Leahmann received the call to the scene at 8:50 a.m. and arrived at the scene at 8:50

a.m.; that it took about thirty to forty-five seconds to get there because it was just down the street; and, that a white female who was working behind the counter was at the scene (R. XXV-518-521).

29. During the applicant's trial, Dean McDaniel testified that he owned Joseph's Deli and Dean's, about a block away; that State's Exhibit 8 was the gun which was kept at Joseph's Deli; that the gun was kept under the counter usually with a towel over it; that McDaniel did not see the gun the day of the offense until a police officer picked it up from under the counter and placed it in a ziplock bag; that Cindy Johnson, a white female deli employee, and Teresa McGee, a black female deli employee, were at the scene when McDaniel arrived; and, that McDaniel later found out that McGee went by two or three names (R. XXV-529-531).

30. C. D. Flowers, Houston Police Department, testified that Officer Marett, the first police officer on the scene, brought to Flowers' attention that there was a pistol on the shelf underneath the cash register behind the counter; that the gun was a .45 automatic with rounds in the clip and none in the barrel; and, that the gun was checked for fingerprints and none were found on the gun (R. XXV-551-584).

31. During the applicant's trial, the applicant's co-defendant, Willie Williams, testified that both Williams and the applicant pulled guns on the complainant; that the complainant came up with a gun from under the counter; that Williams tried to fire his gun but it would not fire; that the applicant shot his gun then ran to the door; that the complainant was in a squatting position at this time; that Williams ran to the door and the applicant

ran outside; that Williams fired his gun once while he was standing half in and half out of the door; that Williams saw the complainant "go down"; that Williams ran out the door then immediately returned to look for the complainant's gun and to see if the complainant was hit; and that Williams could not find the complainant's gun so he grabbed the cash box and ran from the store (R. XXVI-936-965).[2]

32. During the applicant's trial, the applicant's written statement was admitted into evidence in which the applicant stated that he entered the store with Williams; that both pulled guns on the complainant; that the complainant starting [sic] bending over behind the counter; that the complainant came up with a pistol; the applicant guessed the complainant was getting ready to shoot; and, that "we reacted and shot" (R. XXVI-653-695).

Willie Ray Williams' Trial Evidence

33. The Court finds that Willie Williams, on January 29, 1981, entered a plea of guilty in the 174th District Court to the offense of capital murder in Cause No. 323674, a case arising from the same offense as the instant case. The Court further finds that, during Williams' trial, evidence was presented that both Williams and the applicant entered Joseph's Delicatessen; that the applicant was the first to pull his gun on the complainant; that

[2] The Court finds that Willie Williams testified during the applicant's first trial which ended in a mistrial. During the applicant's second trial, Williams refused to testify, pursuant to U.S. CONST. amend. V, and his testimony from the applicant's first trial was read to the jury (R. XXVI-916-921, 925-965).

the applicant was the first to fire his gun at the complainant; that the complainant then went into a squatting position; that the applicant ran to the door; that Williams followed the applicant to the door and fired his gun from the door; that Williams then re-entered the store; and that Williams was not able to determine where the complainant was hit (WW V-614-618).

Offense Report

34. The Court further finds, according to portions of the offense report, that Teresa McGee was an employee of Joseph's Deli on October 13, 1980; that she was at the deli during the offense; that she claimed not to have seen anything; that she was uncooperative with her employer, Dean McDaniel, after the offense and was fired and left the scene before the first police officer arrived on the scene; that her address is given as 7605 Phoenix #826; and, that no phone is indicated. **Offense Report # – 10049380, applicant's stamp marks N000544, N000548, N000550.**

35. The Court further finds, according to portions of the offense report, that Dean McDaniel told the police that "the gun that the compl (complainant) reached for was a .45 auto (automatic) and that the police took the gun with them to the station;" that a .45 caliber automatic, serial # 15430, and clip was recovered from under the counter at the scene of the offense; that Officer C. D. Flowers recovered and tagged the complainant's pistol as # 3-532-1 for the Houston Police Department property room. **Offense Report # – 10049380, applicant's stamp marks N000549, N000550.**

36. The Court further finds, according to portions of the offense report, that the complainant was pronounced dead in the emergency room of Ben Taub Hospital at 9:52 a.m. after being transferred from the scene of the offense by Houston Fire Department ambulance #1133; that the first detectives arrived on the scene of the offense at 10:10 a.m.; that the complainant had already been taken to Ben Taub when the detectives arrived at the scene. **Offense Report # 10049380, applicant's stamp marks N000545, N000546, N000547.**

37. The Court finds, based on the testimony at the applicant's trial, the offense report, and the written statement of Cindy Johnson, that trial counsel and the jury were aware of the contention that the complainant had reached for and/or seized his gun. **See Finding Nos. 26, 27, 31, 32, 35.**

1992 Affidavit of Teresa Henry Ishman
aka Teresa McGee

38. The Court finds that, in 1992, Teresa McGee gave habeas counsel an affidavit in which she asserted that two men entered the deli; that she recognized the applicant because she ["knew I had seen him before" /s/ WTH]; that the applicant came up to the steam table; that she saw Williams with a gun in his hand; that the complainant reached under the counter for his gun; that Williams said something like "don't go for the gun;" that immediately afterwards shots started firing; that she ran to the back of the store; that she told police at the scene that she had not seen anything; and, that a few days later someone took her to the District Attorney's Office where she told an unidentified man everything she saw. **1992 affidavit of Teresa McGee Ishman, attached as**

exhibit to applicant's petition for writ of habeas corpus, cause no. 323836-B.

39. The Court finds, based on the evidence elicited during the applicant's trial, Teresa McGee's assertion in her 1992 affidavit that the complainant was reaching for his gun is cumulative of evidence presented during the applicant's trial. **See Finding Nos. 26, 27, 31, 32.** The Court further finds that Teresa McGee does not assert in her 1992 affidavit that she saw the complainant holding a gun in his hand. **See 1992 affidavit of Teresa McGee Ishman, attached to applicant's petition for writ of habeas corpus, cause no. 323836-B.**

1997 Writ Evidentiary Hearing Testimony of Teresa Henry Ishman aka Teresa McGee

40. During the June 19, 1997 writ evidentiary hearing in cause no. 323836-B, Teresa Ishman[3] testified that she lived in Bogalusa, Louisiana; that her maiden name was Henry; that she was employed at Joseph's Deli in Houston, Texas on October 13, 1980; that she was behind the deli counter when two men walked in the door on October 13, 1980; that the complainant was at the cash register; that Cindy Johnson, another employee, was cooking in the back but could probably see the front of the store through a window; that the applicant went to the counter and the other man approached the cash register;

[3] For reference to the 1997 writ hearing testimony, the Court will refer to the testimony of Teresa Ishman, not McGee or Henry. However, the names Henry or McGee will be used in reference to evidence elicited from other witnesses.

that she heard the other man say something about a robbery; that she then saw the complainant reaching under and coming up with a gun so she ran to the back while shots were fired; that Cindy Johnson let her in the locked bathroom where they stayed a few minutes; and, that, after they came out of the bathroom, she called the police and Cindy Johnson ran next door (WH II-6-12).

41. During the 1997 writ evidentiary hearing, Ishman further testified that she ran across the street to her sister's apartment after the shooting but her sister convinced her to return to the scene; that the police and an ambulance were at the scene when she returned; that she talked to someone at the scene who was not wearing a uniform and who asked her name; that she told the man that her name was Teresa McGee but it was not her real name; that she gave a false name because the Louisiana police were looking for her for a shoplifting charge; and, that she told the man that she had not seen anything because she did not want to be involved (WH II-12-15).

42. During the 1997 writ evidentiary hearing, Ishman further testified that two or three months after the instant offense, two men came to her apartment and took her downtown to "the police building, or whatever" in "a van or something" where they questioned her; that she did not know the men's names; that the man accused her of letting the applicant rob the store and asked why she gave a false name; that she told the men that she had just worked there two days and that she did not know the applicant although she had seen him "in a club somewhere . . . might be on the streets;" that she gave a false name because of the Louisiana shoplifting charge; that she was questioned about three hours; and, that she did not remember signing anything (WH II-15-20).

43. During the 1997 writ evidentiary hearing, when asked if she told the two men that she was going back to Bogalusa, Louisiana, Ishman testified that she did not know, that she did not remember, or that she might have (WH II-20).

44. During the 1997 writ evidentiary hearing, Ishman testified that she had not been in any trouble with the law since the shoplifting in Louisiana; that she was arrested in Houston sometime after the instant offense and remained in the Houston jail for seven days; that the Houston Police escorted her to Bogalusa, Louisiana for the shoplifting charges; and, that what was stated in her 1992 affidavit was true to the best of her recollection (WH II. 12-15, 21).

45. During the 1997 writ evidentiary hearing, Ishman testified during cross examination that it might have been a few days, a few weeks, or a few months after the offense when two men took her to the District Attorney's Office; that she did not remember; that she had been working at Joseph's Deli under the name of Teresa McGee, the same name she gave the unidentified man at the scene of the offense; that she used the name McGee to apply for the job; that she had used the name Teresa Peters as well as McGee, Henry, and Ishman; and, that she did not remember getting in any more trouble with the law after the Louisiana shoplifting charge which occurred prior to the instant offense (WH II-24-34).

46. During cross examination during the 1997 writ evidentiary hearing, Ishman admitted that she was the same person as Linda Johnson charged with three offenses in Louisiana (WH II-34-35).

47. During cross-examination during the 1997 writ evidentiary hearing, Ishman testified that took her three minutes to run from the deli to her sister's apartment immediately after the offense; that she stayed at her sister's apartment for about fifteen seconds before returning to the scene of the offense; and, that she talked to a plain clothes detective who stopped her by the door of the deli when she returned to the scene; subsequently, Ishman testified that it took her less than ten minutes to run to her sister's apartment (WH II-24-25, 36).

48. During cross-examination during the 1997 writ evidentiary hearing, Ishman testified that she saw the complainant come up from the counter with a gun in his right hand (W II-39-40); that she did not see the complainant point the gun (WH II-40); that she turned and ran to the back when the shots started firing (WH II-40); that she did not know how many shots she heard but "let's just say" one to five (WH II-52); that, when asked if the applicant or Williams were mistaken when they had said something different concerning whether they had guns, she replied, "probably did have a gun" (WH II-53); that she did not know and it was possible that she did not really see everything, that she "saw just what (she) saw," the complainant coming up with a gun (WH II-53).

49. During cross-examination during the 1997 writ evidentiary hearing, Ishman testified that the sequence of events was that the complainant pulled a gun, she ran, then shots were fired and that it was not correct if she had earlier said that shots were fired, then she turned and ran (WH II-54).

50. During cross-examination during the 1997 writ evidentiary hearing, Ishman testified that she did not

remember if there was a bell over the front door (WH II-48); that she did not remember hearing a bell after she ran to the back (WH II-49); that the complainant's body was lying on the floor on its back with blood pumping out of it after she came out of the back room after the offense (WH II-40-41); that she did not know where the gun was (WH II-41); that she called the police from the telephone in the store by the cash register and ran home (WH II-42); and, that the ambulance was at the scene when she returned from her sister's apartment (WH II-37, 43).

51. During cross-examination during the 1997 writ evidentiary hearing, Ishman testified that she did not know anything about Dean McDaniel firing her at the scene of the offense but "he might have did fire me;" and that she quit the job at the deli (WH II-50-51).

52. During cross-examination during the 1997 writ evidentiary hearing, Ishman testified that the two men who questioned her at the District Attorney's Office were white, about forty-five or fifty-five, and tall (WH II-56); that she told the two men that the applicant was talking to her when the other robber said something about a robbery and that she turned to run when she saw the complainant get his gun and that shots "go to firing" (WH II-58); that the men did not ask if the applicant had a gun (WH II-59); that, when asked if she told the men that she did not see the applicant with a gun, she told them she did not see anything, that she did not know, and that she did not remember (WH II-59); that, when asked if she told the men that she did not see the other robber with a gun, she did not see him because she saw the complainant with his gun and she did not get to see them with a gun because she started running (WH II-59); that she did not remember if she told the men she was going back to Bogalusa

(WH II-60); that she did not remember if the two men told her that the questioning was in connection with Willie Williams' case but they might have (WH II-60).

53. During cross-examination during the 1997 writ evidentiary hearing, Ishman testified that her statement in her 1992 affidavit that she was crying while being questioned about three hours and the man was handing her tissues "might have been" true, that she did not know (WH II-61); that, when asked about her testimony about two men questioning her and her 1992 affidavit about one man questioning her, replied "one man, two men, I don't remember. I don't remember one man or two men. I talked to some mens or I talked with a man" (WH II-63); that she was not sure about the two men being in the office even though she had testified earlier that there were two men in the office (WH II-64); that the man or men at the District Attorney's Office did not tell her not to tell anyone else what she had told them; and, that that [sic] they just told her she was finished and could leave (WH II-66).

54. During the 1997 writ evidentiary hearing, in response to the trial court's questions, Ishman testified that the name on her birth certificate was Teresa Marie Henry; that she probably gave the Louisiana police the name Teresa Henry but she did not know; that she thought there was a warrant under the name of Teresa Henry for her arrest in Louisiana while she was in Houston; that she probably put her real name on her lease for the Houston apartment; that she told people her name was Tressi Henry; that the people at the deli knew her by Teresa; that the complainant came up with a gun that had a silver part on it during the offense; that the plain clothes men she talked to at the scene after the offense knew that she was in the store at the time of the robbery; that she

told them her name was Teresa McGee, that she might have given them a wrong phone number; that she did not remember if she gave them an address but it was possible that she gave a wrong address if she did; that she told them she did not see anything; that Houston police plain clothes detective picked her up about six months after the instant offense and put her in the city jail under her real name for a week; that some officers from Bogalusa then escorted her to Bogalusa; that the people from the District Attorney's Office knew her real name was Teresa Henry; and, that she did not know if they knew she was wanted in Louisiana (WH II-69-83).

55. During the 1997 writ evidentiary hearing, the applicant and the Respondent stipulated that Teresa McGee aka Teresa Henry was arrested by the Harris County Sheriff's Department on a fugitive warrant on March 26, 1981 and released three days later (WH III-48).

56. The Court finds that Teresa Ishman's 1997 writ evidentiary testimony that she took about three minutes to run from the deli to her sister's apartment immediately after the offense and that she stayed at her sister's apartment for about fifteen seconds before returning to the scene of the offense where she talked to a plain clothes detective is contradicted by official records which show that the offense occurred sometime before 8:50 a.m., the time the ambulance was summoned and arrived on the scene and which show that the first detective arrived on the scene one hour and twenty minutes later at 10:10 a.m. (WH II-24-25, 36). **See Finding No. 47.**

57. The Court further finds that Teresa Ishman's 1997 writ evidentiary testimony did not exculpate the applicant; that, even if Ishman's testimony had been

presented at trial and if the jury believed that the applicant did not shoot the complainant based on Ishman's testimony, a parties charge was submitted to the jury and there was sufficient evidence of the applicant's participation and guilt in the instant offense. **See Finding Nos. 22-25, 27, 31, 32.**

58. The Court further finds that even if the jury believed that the complainant was reaching for and/or got his gun, as Ishman asserts, the jury was presented with the same evidence through other means. **See Finding Nos. 26, 27, 31, 32.**

59. The Court further finds that the Court of Criminal Appeals, in **Davis v. State**, 597 S.W.2d 388 (Tex. Crim. App. 1980), held that a robber has no right to self-defense.

60. The Court further finds that the Court of Criminal Appeals, in **Smith v. State**, 676 S.W.2d 379, 393 (Tex. Crim. App. 1984) held that the evidence was sufficient to support an affirmative answer to the third special issue concerning provocation where robbers entered the store with loaded guns, the victim entered the store during the robbery and pulled a gun and fired at one of the robbers, and then the other robber shot and killed the victim.

61. The Court finds that the trial court submitted the following third special issue to the jury during the punishment phase of the applicant's trial: whether the applicant's conduct in killing the deceased was unreasonable in response to the provocation, if any, by the deceased. The court finds that the jury answered the third special issue in the affirmative, i.e., that the applicant's

conduct in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

62. The Court further finds that Ishman's 1992 affidavit and her 1997 writ evidentiary testimony does not support a negative answer to the third special issue as to whether the applicant's conduct in killing the deceased was unreasonable in response to the provocation if any, by the deceased.

[62A. Teresa McGee stated in her affidavit that she remembers other guy say "robbery" or "stickup and when he said that she saw "he had a gun in his hand." Right then Mr. Shaeffer reached under the counter for his gun. /s/ WTH]

1997 Writ Evidentiary Hearing Evidence

63. The Court finds, according to the credible affidavit of the Honorable Bob Burdette, that he was employed as an assistant district attorney prior to being a state district judge; that he was the chief prosecutor in the 174th District Court where he prosecuted the capital murder trial of Willie Ray Williams, cause no. 323764; that John Ray Harrison was assigned as the investigator in the 174th District Court; and, that Williams was the co-defendant of the applicant who was tried for capital murder by assistant district attorney Ira Jones in the 178th District Court. **State's Exhibit 5, September 19, 1997 affidavit of Bob Burdette.**

64. The Court further finds, according to Burdette's credible affidavit, that Burdette reviewed State's Exhibit 3, a typewritten memo dated December 31, 1980, from J. R. (John Ray) Harrison to the file in Willie Williams' case;

that, according to the memo, Harrison located and transported a witness re Houston Police Department Case #010049380 to 201 Fannin where she was interviewed by Burdette on December 30, 1980; that the Harris County District Attorney's Office is located at 201 Fannin now and was also located there on December 30, 1980; and, that, according to the memo, the witness was known as Teresa McGee but was located at 7605 Phoenix under the name of Teresa Henry aka Teresa McGee aka Tina Henry. **Id.**

65. The Court further finds, according to Burdette's credible affidavit, that Burdette does not dispute the contents of Harrison's memo, but Burdette has no recollection of interviewing this witness and has no knowledge of her whereabouts other than what is reflected on the face of the memo; that Burdette also reviewed the offense report, HPD Incident # 010049380, which states that Teresa McGee, an employee of the deli where the offense occurred, saw nothing, was uncooperative, and was fired and left the scene of the capital murder prior to the arrival of the police; that Burdette has no specific recollection of interviewing this witness; that Burdette can state, based on his years of experience as an attorney, that he would not have begun an interview with a witness by accusing her of being a participant in the offense and he would not have told such a witness that she could leave the State of Texas knowing that Williams' co-defendant had not yet been tried for the same offense. **Id.**

66. The Court further finds, based on the credible affidavit of Bob Burdette, that Burdette did not put on a full case in Willie Ray Williams' trial because he entered a plea of guilty to the offense of capital murder, that Teresa McGee aka Teresa Henry did not testify at Williams' trial; that Burdette would have conveyed information to defense

counsel if Teresa McGee aka Teresa Henry had given Burdette information which would have been exculpatory to the defendant at either guilt or innocence, and, that Burdette did not suppress the name or location of Teresa McGee aka Henry and was never asked to suppress such information by anyone, and would not have done so if asked. **Id.**

67. The Court finds, according to the credible affidavit of John Ray Harrison, that Harrison is presently employed as Assistant Chief Investigator with the Harris County District Attorney's Office; that, in October, 1980, Harrison was assigned as the investigator to the 174th District Court; that Harrison has reviewed the following District Attorney's office rosters and agrees with the following information: according to the September 2, 1980 office roster, Harrison was the investigator assigned to the 174th District Court and Bob Burdette was the chief prosecutor of the 174th; according to the September 2, 1980 office roster, John Holleman was the chief prosecutor in the 178th District Court; according to the October 9, 1980 office roster, Harrison was still the investigator assigned to the 174th District Court and Bob Burdette was the chief prosecutor of the 174th; according to the handwritten notation on the October 9, 1980 office roster, John Holleman was the chief prosecutor of the 178th District Court but (Ira) Jones replaced John Holleman as chief prosecutor of the 178th District Court some time after the roster was compiled on October 9, 1980; according to the December 8, 1980 office roster, Harrison was still the investigator assigned to the 174th District Court; Bob Burdette was still the chief prosecutor of the 174th District Court, and Ira Jones was still the chief prosecutor of

the 178th District Court. **State's Exhibit 7, September 18, 1997 affidavit of John Ray Harrison.**

68. The Court further finds, according to the credible affidavit of John Ray Harrison, that Harrison assisted the prosecutor assigned to the 174th District Court in investigating and preparation of cases for trial; that part of Harrison's duties as an investigator assigned to the 174th District Court was to locate and to transport witnesses; that Harrison has reviewed a type-written memo from himself to the file in the case of the State of Texas v. Willie Ray Williams; that Harrison has no specific memory of the contents of the memo, but he does remember that Willie Ray Williams was a capital murder case tried by Bob Burdette in the 174th District Court; that, according to the memo dated December 31, 1980, on December 30, 1980, Harrison located and transported a witness re Houston Police Department Case #010049380 to 201 Fannin where she was interviewed by Bob Burdette; that, according to the memo, the witness was known as Teresa McGee but was located under the name of Teresa Henry aka Teresa McGee aka Tina Henry; and, that Harrison has no recollection of being present at any interview between this witness and Bob Burdette. **Id.**

69. The Court further finds, according to the credible affidavit of John Ray Harrison, that Harrison reviewed a letter, attached as State's Exhibit G to Harrison's affidavit; that the face of the letter reflects that John Holleman, Assistant District Attorney, wrote this letter to Teresa McGee; 7605 Phoenix #826; Houston, Tx, on November 20, 1980, stating that he was prosecuting Joseph Nichols for the murder of Claude Shaffer and that it was important that he talk with her; that, according to the October 9,

1980 office roster, John Holleman was the chief prosecutor in the 178th District Court and was replaced sometime between October 9, 1980 and December 8, 1980 by Jones (which would have been Ira Jones); that there is an undated handwritten note on the face of the November 20, 1980 letter stating, "Ira, there is no Teresa McGee. If you need her see me;" that Harrison wrote this note; that this handwritten note, when considered along with the memo from Harrison to the file, indicates that Teresa McGee was going by the name Teresa Henry and that Harrison located her on December 30, 1980; that, therefore, Harrison's handwritten note would have been written sometime on or after December 30, 1980; that, based on Harrison's memo to the file, Harrison would have given the location of Teresa McGee aka Henry as 7605 Phoenix; and, that Harrison has no knowledge of Teresa McGee aka Henry being at any other location. **Id.**

70. The Court finds based on the credible affidavit of John Ray Harrison, that Harrison also reviewed an investigator work request, attached to Harrison's affidavit as State's Exhibit H, submitted by Ira Jones on January 28, 1981; that the work request was received by Gregory, Lt. Investigator; that the work request was assigned to Harrison as investigator of the 174th District Court and to R.O. Boggs, investigator of the 178th District Court; that it is reasonable to assume that Harrison wrote the handwritten note on Holleman's November 20, 1980 letter after January 28, 1981, the date Harrison was assigned the investigator work request; that Harrison would have given Teresa McGee's aka Henry's location as 7605 Phoenix, the only location of which Harrison ever had knowledge. **Id.**

71. The Court further finds, based on Harrison's credible affidavit, that it is not unusual for one prosecutor

to begin preliminary work on a case and then be transferred into another court; that the case is then picked up by the prosecutor who replaces the first prosecutor in that particular court; that Harrison did not suppress the name or location of Teresa McGee aka Henry; and, that Harrison was never asked to suppress such information by anyone, including Ira Jones or Bob Burdette. **Id.**

72. The Court finds, based on the credible affidavit of James L. Hall, that Hall served as a police officer with the Houston Police Department from 1969 to 1982; that, on October 13, 1980, Hall was a detective assigned to the Homicide Division of the Houston Police Department; that, on October 13, 1980, at 10:00 a.m., Detective Eli Uresti and Hall received a radio dispatch to a robbery/murder at 7205 Fannin; that Hall and Uresti arrived at the crime scene at Joseph's Deli at 10:10 a.m.; that the complainant had already been transported to Ben Taub Hospital and was dead when Hall and Uresti arrived at the scene; that the suspects were no longer at the scene; that, as is customary at homicide scenes, one detective interviews witnesses and the other detective does a scene summary; that Uresti was responsible for the scene summary and Hall was responsible for the witnesses at the scene of the instant offense; that according to the usual practice at homicide scenes, witnesses are interviewed by a homicide detective rather than a patrol officer, although a patrol officer might speak to witnesses briefly prior to the arrival of the homicide team and instruct the witnesses to remain to talk with a homicide detective; and, that a witness would be directed to one of the homicide detectives if a witness left the scene of the offense and returned after the arrival of the homicide team. **State's Exhibit 6, September 18, 1997 affidavit of James L. Hall.**

73. The Court further finds, according to the credible affidavit of James L. Hall, that Hall reviewed the offense report, including supplements, in the instant case; that although Hall cannot recall all the facts and circumstances of the instant case, he remembers that when he and Uresti arrived at the crime scene, the owner of the store said that there were two witnesses to the offense but one witness, later identified as Teresa McGee, had left the scene; that, after the owner told Hall that McGee might still be outside and might be getting in a car, Hall ran outside the store and saw a black female getting in a car; that Hall was unable to stop her and did not talk to her; that Hall was not able to determine if she was Teresa McGee; that the offense report reflects that Theresa McGee, an employee at Joseph's Grocery & Deli, was uncooperative, claimed not have to seen anything, was fired by the owner, and left the scene before the first officer arrived on the scene; that the owner of the store gave Hall the information about McGee in the offense report; that, if Hall or any police officer had interviewed a witness named Teresa McGee or Teresa Henry either at the scene of the offense or later at another location, such information would be reflected in the offense report, including supplements; that there is nothing in the offense report, including supplements, which indicates that Teresa McGee aka Teresa Henry was interviewed by the police; and, that, if Teresa McGee aka Teresa Henry had returned to the scene of the offense and talked with the police, such information would be included in the offense report, incident no. 010049380, which it is not. **Id.**

74. The court finds, according to the credible affidavit of Eli Uresti, that Uresti is presently employed as an investigator with the Harris County District Attorney's Office; that he was previously employed as an officer with

the Houston Police Department from 1963 to 1988; that, on October 13, 1980, he was a detective in the Homicide Division of the Houston Police Department; that, on October 13, 1980, Uresti and Detective James L. Hall received a radio dispatch at 10:00 a.m. to a robbery/murder at Joseph's Grocery & Delicatessen at 7205 Fannin; that Uresti and Hall arrived at the scene at 10:10 a.m.; that, when Uresti and Hall arrived at the scene, the complainant, Claude Shaffer, had already been transported to Ben Taub Hospital and was dead and the suspects, two black males, were no longer at the scene. **State's Exhibit 9, September 18, 1997 affidavit of Eli Uresti.**

75. The Court further finds, according to the credible affidavit of Eli Uresti, that Detective Hall was responsible for interviewing the witnesses at the scene of the instant offense and Uresti was responsible for doing a scene summary; that, according to the usual practice at homicide scenes, witnesses are interviewed by a homicide detective rather than a patrol officer, although a patrol officer might speak to witnesses briefly prior to the arrival of the homicide team and instruct the witnesses to remain to talk with a homicide detective; and, that a witness would be directed to one of the homicide detectives if a witness left the scene of the offense and returned after the arrival of the homicide team. **Id.**

76. The Court further finds, according to the credible affidavit of Eli Uresti, that Uresti reviewed the offense report, including supplements, in this case; that Uresti cannot recall all the facts and circumstances of the instant case, but he can specifically state that, if he or Detective James Hall had interviewed a witness named Teresa McGee or Teresa Henry at the scene of the offense, that

would be reflected in the offense report; that the offense report reflects that Teresa McGee, an employee at Joseph's Grocery & Deli, claimed not to have seen anything, was fired by the owner, and left the scene before the first officer arrived on the scene; and, that, if Teresa McGee aka Teresa Henry had returned to the scene of the offense and talked with the police, such information would be included in the offense report, incident no. 010049380, and it is not so reflected. **Id.**

77. The Court finds, according to the credible affidavit of G.L. Dollins, that Dollins was a police officer with the Houston Police Department from 1973 to 1994; that, during October, 1980, Dollins was a Detective assigned to the Homicide Division of the Houston Police Department; that Dollins reviewed the offense report in the case, incident no. 010049380; that, as a homicide detective on the evening shift, Dollins participated in the investigation of the October 13, 1980 capital murder of Claude Shaffer; that Dollins was not one of the detectives dispatched to the scene of the offense; that, on October 14, 1980, Dollins and Detective Reuben Anderson were ordered to continue the investigation; that Dollins and Anderson read the initial offense report in the case and then went to Joseph's Grocery Store at 7205 Fannin, the location of the shooting; that Joseph's was closed but a sign on the door directed Dollins and Anderson to Dean's Drive Inn down the street; that they met Dean McDaniel, the owner of Dean's and of Joseph's Grocery Store, at Dean's Drive Inn; that McDaniel told Dollins and Anderson that he was not present at Joseph's at the time of the offense, but he did arrive before the police arrived; that McDaniel said that he was approached at Joseph's right after the shooting by an employee by the name of Teresa McGee who told him that she

did not want to work at Joseph's anymore but wanted to work at Dean's; and, that McDaniel said that he then fired Teresa McGee and she left. **State's Exhibit 8, September 22, 1997 affidavit of G.L. Dollins.**

78. The Court further finds, according to the credible affidavit of G.L. Dollins, that Dollins and Anderson then went to Teresa McGee's address at 7605 Phoenix; that they knocked on the door of apartment #826 and the door was opened by a male who identified himself as David Henderson and said that no one lived at that address by the name of Teresa McGee; that Dollins and Anderson were unable to find the apartment manager's office and left after being unable to find or to speak to Teresa McGee; that if Dollins or Anderson had located and interviewed Teresa McGee or a Teresa Henry, such information would be reflected in the offense report of this case.; and, that there is nothing in the offffense report, including supplements, which indicates that Teresa McGee aka Teresa Henry was interviewed by the police. **Id.**

79. During the 1997 writ evidentiary hearing, on September 24, 1997, Brad Beers testified that he was a former prosecutor at the Harris County District Attorney's Office; that he sat with Ira Jones during the applicant's first trial but did not participate in the applicant's second trial; that Beers was familiar with the State's file in the applicant's case; that the first time Beers recalled seeing defense exhibit 3, an interoffice memo from J.R. Harrison in the State v. Williams' file, was within the couple of months prior to his writ hearing testimony; that Beers did not think that the memo was in the applicant's State's file; that Beers did not believe that he was ever aware that Teresa McGee's real name was Teresa Henry; that Beers had been shown Deputy Earl's testimony concerning

attempts to locate Teresa Henry; and, that Beers did not believe that he was ever aware that the State had located her and interviewed her (WH III – 22-26).

80. During the 1997 writ evidentiary hearing, Brad Beers further testified that it is common for witnesses to sometimes give false names and addresses; that J.R. Harrison's memo is addressed to the file of State v. Willie Roy (sic) Williams and refers to assistant district attorney Bob Burdette; that Williams was the applicant's co-defendant and he was tried in a different court than the applicant; that Harrison's memo would not have been placed in the applicant's trial file; that the memo gives a street address on Phoenix; that deputy Terry Earl's attempts to locate Teresa McGee were for the applicant's first trial, not for Williams; that it is possible that Ira Jones, prosecutor for the applicant's trial, was not aware of Harrison's memo; that Beers would have seen the memo if it had been in the applicant's trial file and he did not believe that the memo would have been in the applicant's file; that Beers was not testifying or claiming that Ira Jones suppressed evidence in the applicant's case and that Beers absolutely believed that Jones did not; and, that no one asked Beers to suppress evidence in the applicant's case or any other case while he was at the District Attorney's Office (WH III – 36-39).

81. During the 1997 writ evidentiary hearing, Bill Horn testified that he has been an investigator with the Harris County District Attorney's Office since 1977; that he had previously been a Harris County Sheriff's Deputy; that he was assigned as an investigator to the 178th District Court in 1982; that investigators serve subpoenas, locate witnesses, transport witnesses to court, get material

for assistant district attorneys and fulfill work requests of assistant district attorneys (WH III – 112-113).

82. During the 1997 writ evidentiary hearing, Horn identified State's Exhibit 2 as notes he made on a case while assigned to the 178th District Court; Horn testified that he reviewed the notes prior to his testimony at the writ hearing; that he looked at the State's file to determine if he made any other notes concerning witness Teresa McGee and found none (WH II – 113-114); that according to his notes dated February 12, 1982, Ira Jones requested that Horn locate Teresa McGee and the request would have been made on or about February 12, 1982 (WH III – 127).

83. During the 1997 writ evidentiary hearing, Horn testified that, according to his notes, he first talked to Dean McDaniel in attempting to locate Teresa McGee; that he did not receive any useful information; that he checked with Southwestern Bell information for a listing for Teresa McGee on Phoenix Street; that there was a McGee on Phoenix but it was not the correct McGee; that he then contacted Dean McDaniel's bookkeeper, Janie Reyes; that Reyes gave Horn another name for an employee who worked for Dean McDaniel in October, 1980; that the other name was Teresa Henry and the address for Teresa Henry was the same address Horn had for Teresa McGee at 7605 Phoenix; that Horn obtained from the bookkeeper an apartment number and a social security number of Teresa Henry or Teresa McGee; that Horn then talked with the management of the apartments at 7605 Phoenix and learned that there was a Diane Henry who was a resident at apartment 826; and, that Horn learned Diane Henry's job location, her date of birth, social security

number, mother's name and telephone number (WH III 114-118).

84. Horn further testified during the 1997 writ evidentiary hearing, that he determined that the area code for the telephone number for Diane Henry's mother was for Bogalusa, Louisiana; that he then contacted the Bogalusa Police Department and talked with Officer Spikes; that he learned that the Henry girls were known to Spikes and that Spikes was familiar with a Teresa Henry who had the same social security number that Horn had obtained from Dean McDaniel's bookkeeper; that Officer Spikes related that all of the Henry girls had brushes with the police so Horn determined that their reputation was not considered good; and, that all of Horn's work for his report was done February 12, 1982 (WH III – 119-121).

85. During the 1997 writ evidentiary hearing, Horn further testified that Officer Spikes gave him a date of birth for Teresa Henry which Horn used to obtain a JIMS printout, which is dated February of 1982 and taped to Horn's February 12, 1982 report; that the JIMS report shows that a case was filed on March 26, 1981, a fugitive warrant for Teresa Marie Henry; and, that Horn obtained a booking photograph of an individual which he showed to Cindy Johnson who identified the person in the photograph as Teresa McGee (WH III – 120-122).

86. During the 1997 writ evidentiary hearing, Horn identified State's Exhibit 3 as a memo from J.R. Harrison dated December 31, 1980 and Horn testified that the first time he saw the memo was a couple of weeks prior to his writ hearing testimony when he was in the office of assistant district attorney Roe Wilson (WH III – 122).

87. During the 1997 writ evidentiary hearing, Horn testified that if Ira Jones had asked him to contact Teresa McGee in Bogalusa or asked Horn to confirm that Teresa McGee was still living in Bogalusa, that would have been included in his report, labeled State's Exhibit 2, and there is no mention of any contact with Teresa McGee aka Teresa Henry in Horn's report; that Horn was able to trace and find a Henry family based on information available from Dean McDaniel's bookkeeper, the offense report, and the apartment manager; that someone else could have conceivably obtained such information; that, based on his years experience in law enforcement, witnesses sometimes give false names and addresses to law enforcement; that Ira Jones never asked or told Horn to lose or to hide information concerning where Teresa McGee could be located; that no one at the District Attorney's Office ever asked Horn to suppress information about Teresa McGee's location; and, that Horn gave his report to Ira Jones after making such report (WH III – 123-125).

88. During cross-examination during the 1997 writ evidentiary hearing, Horn testified that he did not think he had ever talked to John Ray Harrison about Teresa McGee (WH III – 135); that he never talked with Teresa McGee aka Teresa Henry (WH III – 140); that he did not know her location when he was asked to find her on February 12, 1982 (WH III – 141); that Horn would have given his notes to Ira Jones after Horn finished on or about February 15, 1982 (WH III – 143).

89. In response to questioning by the trial court during the 1997 writ evidentiary hearing, it was determined that Horn was assigned as the investigator to the 178th District Court in January, 1982 (WH III – 153); and,

that he had never attached a witness out-of state (WH III – 162).

90. The Court finds, based on Horn's 1997 writ evidentiary hearing testimony, that Horn was able to determine Teresa McGee's name and location starting with the same information known to applicant's trial counsel and without the benefit of the memo made by J.R. Harrison to the file in Willie Williams' case.

91. The Court further finds, that J.R. Harrison's memo to the file in Willie Williams' case gave Teresa McGee Henry's address on Phoenix, the same address as noted in the offense report and on the State's subpoenas in the applicant's case. **See Findings Nos. 69, 92.**

92. During the 1997 writ evidentiary hearing, Ira Jones testified that he was a prosecutor for the Harris County District Attorney's Office; that he was the assistant district attorney who prosecuted the applicant in both of his trials for capital murder (WH III – 68); that he brought forward his subpoena list from the applicant's first trial for the applicant's second trial; that the subpoena list for the second trial shows the same address of 7605 Phoenix for Teresa McGee as the subpoena list for the first trial (WH III – 69); that, prior to February 15, 1982, he did not know that Teresa McGee lived in Bogalusa, Louisiana, or that she was known as Henry (WH III – 70, 76); and that he received such information from Bill Horn, an investigator, on February 15, 1982 (WH III – 71).

93. During the 1997 writ evidentiary hearing, Ira Jones testified that voir dire began in the applicant's trial[4] on January 11, 1982 (WH III – 77); that Jones made the State's file available to trial counsel in the first and second trial and also handed it to trial counsel during the applicant's second trial (WH – III – 73); that volume 26, page 858 of the appellate record of the applicant's trial, dated February 21, 1982, reflects that Jones tendered the State's file to counsel during the trial testimony (WH III – 80-81, 84); that Jones placed Bill Horn's February 15, 1982 memo in the State's file, and the memo was in the State's file when Jones proffered the file to trial counsel on February 21, 1982 (WH III – 73, 191); that Jones does not know if trial counsel saw the memo from Bill Horn (WH III – 84); that Jones has no recollection of talking to Bob Burdette about Teresa McGee or Teresa Ishman (WH III – 83); that Jones has no recollection of talking with Teresa McGee or Ishman (WH III – 85); and, that Jones subpoenaed her in the first and second trial (WH III – 85).

94. During the 1997 writ evidentiary hearing, Jones further testified that Bob Burdette was the prosecutor who was responsible for trying the applicant's co-defendant, Willie Ray Williams, in the 174th District Court; that J.R. (John Ray) Harrison was Bob Burdette's investigator; and, that it would be logical for Jones to instruct his investigator to talk with the investigator in the court where a case was pending for a co-defendant (WH III – 179).

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[4] All references to the applicant's trial are to the applicant's second trial in 1982 for capital murder unless specifically noted as the applicant's first trial.

95. During the 1997 writ evidentiary hearing, Jones further testified that the note, "J.R. Harrison knows where she is," was handwritten by him on the January 28, 1981 investigator work request form concerning Teresa McGee; that this note did not indicate that Jones knew at that time that Harrison knew Teresa McGee's location; that Jones' note on the investigator request form referred to Harrison's handwritten note, "Ira, there is no Teresa McGee. If you need her see me," which Harrison made on a typed letter from John Holleman to Teresa McGee dated November 20, 1980 (WH III – 87-91); and, that Jones did not see J.R. Harrison's memo in the case of Willie Ray Williams concerning locating Teresa McGee (WH III – 93).

96. During the 1997 writ evidentiary hearing, Jones testified during cross-examination that John Holleman preceded him as chief of the 178th District Court; that the handwriting on the front of State's Exhibit 1, the State's file in the applicant's case, indicating that the file was shown to defense counsel was Jones; that the handwriting on the front of State's Exhibit 1, the State's file in the applicant's case, indicating a closed file was not Jones' handwriting; that Jones believed the handwriting to be John Holleman's and that the writing was initialed JSH; that Holleman would have worked on the applicant's case prior to Jones since Holleman was the former chief of the 178th District Court; and, that Jones' file in the applicant's case was open to defense counsel during the applicant's first and second trial (WH III – 108-11, 165-166).

97. During the 1997 writ evidentiary hearing, Jones further testified that, based on his years of experience as an assistant district attorney, it is fairly common for witnesses to give false names or addresses and that

sometimes the false information is close to the truth but not totally truthful (WH III – 167); that Jones normally issues a subpoena using the name of the witness noted in the offense report (WH III – 168); that Jones might sometimes later discover that a witness used a different name but that Jones would continue issuing subpoenas in the name used in the offense report for a matter on consistency; that Jones took Teresa McGee's name and address at 7605 Phoenix from the offense report when he issued subpoenas for her in the applicant's trial (WH III – 168); and, that Jones did not have any knowledge or indication prior to the applicant's first trial that Teresa McGee might not be at the Phoenix address or that she might be using a different name (WH III – 168).

98. During the 1997 writ evidentiary hearing, Jones testified that the jury in the applicant's trial was presented with evidence that the complainant was reaching for a gun (WH III – 168-170); that State's Exhibit 4 was an application for a subpoena dated January 8, 1982, in the case against Joseph Bernard Nichols, cause no. 323836, which Jones prepared sometime prior to February 15, 1982 (WH III – 171); that February 15, 1982 was the date on which Jones wanted the witnesses to appear (WH III – 171); that the xerox copy of an envelope, attached to State's Exhibit 4, was stamped "Return to sender, undeliverable as addressed" and the post office stamped the envelope on January 12, 1982 (WH III – 172); that the particular subpoena was issued to Teresa McGee, 7605 Phoenix, Houston, Texas 77030 (WH III – 172); that Jones first became aware after January 12, 1982, that the subpoena could not be delivered to Teresa McGee at the listed address (WH III – 172); that Jones made the handwritten notation "Dean McDaniel" on the subpoena after it

was returned and then gave it to his investigator, Bill Horn, telling him to talk to Dean McDaniel, McGee's former employer, to attempt to locate the witness (WH III – 173-174); and, that the prior subpoenas had not been returned (WH III – 173).

99. During the 1997 writ evidentiary hearing, Jones further testified that he did not consider Teresa McGee to be a credible witness based on the information which Jones received from Bill Horn; that, at the time of the applicant's trial, the Palafox Rule was in effect which meant that an attorney had to be able to vouch for the credibility of his witnesses; that, based on McGee's claim of seeing nothing during the offense, her lack of

* * *

the time Horn traced McGee to Louisiana that she had was not credible and he could not vouch for her testimony (WH III – 202); that Jones has no recollection of relaying Horn's information to the applicant's defense counsel but he could have (WH III – 203).

103. The Court finds that, during the 1997 writ evidentiary hearing, the applicant presented the affidavit of counsel Robert Scott who stated that the defense was hampered by the fact that the defense could not locate Teresa McGee; that defense counsel was never informed that Teresa McGee was Teresa Henry and could be located in Bogalusa, Louisiana; and, defense counsel were not allowed access to the State's file prior to the applicant's second trial. **Applicant's exhibit 51, September 17, 1997 affidavit of Robert Scott.**

104. The Court finds that, during the 1997 writ evidentiary hearing, the applicant presented a second

affidavit of counsel Robert Scott who stated that he attempted to locate Teresa McGee through the owner and accountant at Joseph's Deli, but they were uncooperative and did not inform Scott that McGee was known by any other name. **Applicant's exhibit 56, September 24, 1997 affidavit of Robert Scott.**

105. The Court finds that, during the 1997 writ evidentiary hearing, the applicant presented the affidavit of counsel Raymond Dickens who stated that the defense was hampered by the fact that the defense could not locate Teresa McGee; that defense counsel was never informed that Teresa McGee was Teresa Henry and could be located in Bogalusa, Louisiana; and, defense counsel were not allowed access to the State's file prior to the applicant's second trial. **Applicant's exhibit 55, September 23, 1997 affidavit of Raymond Dickens.**

106. The Court finds that, during the 1997 writ evidentiary hearing, the applicant presented the affidavit of counsel Neil Lane who stated that no information was provided to counsel regarding the name and location of Teresa McGee other than the information contained in the State's subpoena in the case. **Applicant's exhibit 54, June 11, 1997 affidavit of Neil Lane.**

107. The Court finds that, during the 1997 writ evidentiary hearing, the applicant presented the affidavit of counsel Ron Mock who stated that he represented Willie Ray Williams in his trial for capital murder; that Mock remember [sic] hearing from Bob Burdette that there were two women employees in the store who both saw the complainant pull a gun; that Mock did not remember the names of the two women but believed that he had a witness statement from one; and, that he did not discuss

the witnesses with the applicant's defense counsel. **Applicant's exhibit 52, September 22, 1997 affidavit of Ron Mock.**

108. The Court finds that, during the 1997 writ evidentiary hearing, the applicant presented the affidavit of Henry Oncken who stated that, in his expert opinion, the purported testimony which would have been given by Teresa Henry Ishman was material information, according to the standard of **Brady** and its progeny. **Applicant's exhibit 57, September 23, 1997 affidavit of Henry Oncken.**

Suppression and Materiality

109. The Court finds that the Supreme Court, in **Brady v. Maryland**, 373 U.S. 83, 83 S.Ct. 1194 (1963), held that suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment.

110. The Court finds that the Supreme Court, in **United States v. Agurs**, 427 U.S. 97, 110, 96 S.Ct. 2392, 2400 (1976), held that the standard of materiality of undisclosed evidence is whether the omitted evidence creates a reasonable doubt of guilt that did not otherwise exist; further, the mere possibility that undisclosed information might have helped the defense or might have affected the outcome of the trial does not establish materiality.

111. The Court finds that the Supreme Court, in **United States v. Bagley**, 473 U.S. 667, 105 S.Ct. 3375 (1985), held that evidence is material where there is a

reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different.

112. The Court finds that the Texas Court of Criminal Appeals, in **Ex parte Adams**, 768 S.W.2d 281 (Tex. Crim. App. 1989), adopted the materiality standard set forth by the Supreme Court in **Bagley** and held that a reasonable probability is a probability sufficient to undermine confidence in the outcome.

113. The Court finds that the Texas Court of Criminal Appeals, in **Crawford v. State**, 617 S.W.2d 925, 931 (Tex. Crim. App. 1980); held that accepting that certain evidence is favorable to the defense, it still must be determined whether such evidence is material.

114. The Court finds that the Texas Court of Criminal Appeals, in **Quinones v. State**, 592 S.W.2d 933 (Tex. Crim. App. 1980), held that the omission must be evaluated in the context of the entire record when determining materiality.

115. The Court finds that, on federal habeas review of the applicant's case, the Fifth Circuit Court of Appeals stated that "[n]or do the 1992 affidavits (affidavits of Teresa McGee and Cindy Johnson) show a probability of a different result sufficient to undermine confidence in the outcome. **Nichols v. Scott**, 69 F.3d 1255 (5th Cir. 1995).

116. Without making a determination concerning the credibility of Teresa McGee Henry Ishman's version of the instant offense, the Court finds when placing such assertions in the context of the entire record, that the jury was aware of the contention that the complainant had reached for and/or seized his gun and, notwithstanding the

cumulative nature of Ishman's assertion, a significant portion of her testimony would have been subject to substantial impeachment if presented at trial.

117. The Court further finds that credible evidence contradicts Ishman's assertion that she presented such version of the instant offense to either the police or to an assistant district attorney prior to the applicant's trial.

CONCLUSIONS OF LAW

1. [Copy struck by /s/ WTH]

2. [Copy struck by /s/ WTH], the applicant fails to show the materiality of any undisclosed information, i.e., that such information creates a reasonable doubt of guilt that did not otherwise exist so that the results of the proceeding would have been different. **See United States v. Agurs**, 427 U.S. 97, 110, 96 S.Ct. 2392, 2400 (1976); **United States v. Bagley**, 473 U.S. 667, 105 S.Ct. 3375 (1985); **Ex parte Adams**, 768 S.W.2d 281 (Tex. Crim. App. 1989) (court adopted the materiality standard set forth by the Supreme Court in **Bagley** and held that a reasonable probability is a probability sufficient to undermine confidence in the outcome).

3. [Copy struck by /s/ WTH], the applicant fails to show that any undisclosed information, [Copy struck by /s/ WTH], is material when evaluated in light of the entire record. **See Crawford v. State**, 617 S.W.2d 925, 931 (Tex. Crim. App. 1980); **Quinones v. State**, 592 S.W.2d 933 (Tex. Crim. App. 1980); **see also Nichols v. Scott**, 69 F.3d 1255 (5th Cir. 1995) ("[n]or do the 1992 affidavits [affidavits of Teresa McGee and Cindy Johnson] show a

probability of a different result sufficient to undermine confidence in the outcome).

[3A. The testimony from Teresa McGee that she had seen the defendant before, possibly in a club, that he walked into the place where she had been Mr. Shaver [sic] had been shot and then telling the police at the scene that she did not know anything would have very unfavorable evidence for the defendant. /s/ WTH.]

4. In the alternative, the applicant fails to show that any undisclosed informtation [sic] could not have been obtained by the applicant's counsel through due diligence.

5. The applicant fails to demonstrate that his conviction was unlawfully obtained. Accordingly, it is recommended to the Texas Court of Criminal Appeals that relief be denied.

BY THE FOLLOWING SIGNATURE, THE COURT ADOPTS THE RESPONDENT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN CAUSE NO. 323836-B:

SIGNED this 9 day of April, [Copy struck by /s/ WTH] 2001.

/s/ William Harmon
WILLIAM HARMON
Presiding Judge
178th District Court

EXHIBIT A

Incident No. _____

STATEMENT

STATE OF TEXAS: DATE: October 13, 1980

COUNTY OF HARRIS: TIME: 12:35 P. M.

Before me the undersigned authority, personally appeared Cindy Ann Johnson, who after being duly sworn on his/her oath deposes and says; My name is Cindy Ann Johnson and I am 19 years of age, having been born on 1-28-61. My home address is 1800 Fl Pasel #112; telephone number none. I am employed at Joseph's Deli and Grocery, 7205 Fannin; telephone number 795-4647.I can also be reached at _____. My Driver License number is WY 82310, Wyoming and my Social Security number is 527-59-4730.

This morning I was at work and at about 8:50 AM two black men came into the store and one of the men got a quart bottle of beer and the other man got a corn dog from the deli. Both of the men walked to the cash register which is located near the front door of the store. When they were walking to the cash register one of the men pulled out a gun and said something to the effect "get out of the way", Claude Shaffer was working the cash register and he keeps a gun under the counter. Claude reached for his gun and both of the black men shot Claude. Both of the black men started running out of the door before they got any money. One of the black men came back in and grabbed a box that had some change in it and ran back out. When this man ran back in I heard another shot but I did not see him shoot.

Just before Claude was shot I heard one of the balck [sic] men say something like "don't be doing that." Right

after Calude [sic] was shot and fell to the floor I ran to the back of the store. When I heard them leave I ran out of the store and went to the other store located about a block away on Fannin. I told them what happened and they called the ambulance and the police. I only seen one of the guns that the black men had and it was a revolver and dark in color.

One of the black men was short, about 5'9", bushy hair, no hat, light colored shirt. I am not sure of the pants and I believe he was wearing tennis shoes. He looked to be in his early 20's. He looked to weigh about 130 to 140 pounds.

The other black man was about 6', I did not get a good look at this man. I believe I can recognize the shorter man if I see him again. I have completed 11 years of school/ college and can read and write the English Language. I have read this statement and it is true and correct to the best of my knowledge. I have given this statement to Detective B. E. Frank of my own free will. This statement was typed by Det. B. E. Frank.

SIGNED: Cindy A. Johnson

Subscribed and sworn to before me this 13 day of Oct., 1980

SIGNED: [Illegible]
NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

Page 1 of 1 pages

EXHIBIT B

John B. Holmes, Jr.

DISTRICT ATTORNEY

INTER-OFFICE MEMORANDUM

To: File **Date** 12-31-80

From: J.R. Harrison

Subject: State vs. Willie Roy Williams

Reference H.P.D. Case #010049380 witness Teresa McGee is Teresa Henry B/F 4-26-58. This Investigator located Ms. Henry on 12-30-80 at 7605 Phoenix #906. Ms. Henry was transported to 201 Fannin where an interview was conducted with ADA Bob Burdette.

Teresa Marie Henry
B/F 4-26-58
S.S. #438-08-7486
aka Teresa McGee
Tina Henry
No local history or want.
No TCIC/NCIC history or want.

EXHIBIT C

STATEMENT OF PERSON IN CUSTODY

Date OCTOBER 17, 1980

Time 6:30 p.m.

Statement of WILLIE RAY WILLIAMS taken in Harris County, Texas.

Prior to making this statement I have been warned by DETECTIVE J.L. HALL, the person to whom this statement is made, that

1) I have the right to remain silent and not make any statement at all and any statement I make may and probably will be used against me at my trial;
2) Any statement I make may be used as evidence against me in court;
3) I have the right to have a lawyer present to advise me prior to and during any questioning;
4) If I am unable to employ a lawyer, I have the right to have a lawyer appointed to advise me prior to and during any questioning and;
5) I have the right to terminate the interview at any time.

Prior to and during the making of this statement I knowingly, intelligently and voluntarily waive the rights set out above and make the following voluntary statement:

My name is Willie Ray Williams and I am 24 years old. I live at different places. I stay with friends or relatives. I was born on 2-12-56.

On Monday morning in the early morning hours around 2am, the 13th of October we, meaning this last week I was with Joe Nichols, Charlotte Parker and Evelyn Harvey, we all got a room at the ACTII.

We left the room about 6:30am and went riding. We was scouting for places to jack, meaning to rob. Everyone in the car, the blue Toyota, knew what we was doing. We was riding and Joe suggested we go down Fannin and he said he knew a cool place. Charlotte said she did too. I was in the back with Joe and Charlote [sic] was driving and Evelyn was in the front passnger [sic] side. We got down on Fannin Joe said one place and Charlotte said another place. We took the place Joe said. We got down by the apartments and parked on the side of the store near the apartments.

Me and Joe got out and went in the store, some kind of Deli, and then went to the back. We came back to the front and I was standing in front of the counter and Joe was to the far left next to the food counter. I had on jeans and a slong [sic] sleeve button up shirt. He was wearing jeans and some kind of shirt. We both had guns, I was carrying a .380 automatic and Joe had a .38 snubnose. The man was behind the counter and I put a quart bottle of beer on the counter and Joe got a corn dog. We were getting ready to pay for the corn dog and Joe dreg [sic] down on the man and I did too. Joe told the man dont do that to the old man. The old man had a gun in his hand. Joe fired one shot and the old man went down like he was squatin down and hadnt been hit. Joe was already out the door and I was going out the door and I had the gun still pointed back toward the old man. I thought he was coming up on me and I just fired. I ran out the store. I ran back in to see if the man had been hit. While I was looking at him to see

where he was hit I grabbed the box behind the counter and ran. I ran out and to the car which was down the area where they had parked but had pulled out and was coming down the street. I got in the back and we went looking for Joe. WE picked him [sic] around the corner. We left and went to the house. We took the money out and divided it up. It was all change, no bills. WE left and went back to the Act II later. WE left there and went to Best Way. We stayed there until the next morning and me and Charlotte went to the country and came back the next day. We stayed on Prudence until today. When we found the police were coming Charlotte went and got the gun and hid it.

/s/ Willie R. Williams
Signature of Person Making Statement

/s/ David E. Calhoun
D-731 10/17/80 7:07 pm
Witness

/s/ [Illegible] D728
Witness

Page ___ of ___ pages

EXHIBIT D

[SEAL]

ASSISTANT: IRA JONES

DATE SUBMITTED: 1-28-81

FILE ATTACHED: (✓) YES ( ) NO

NEEDED BY: 2-25-81

174th ___ 176th ___ 177th ___ 178th ✓

179th ___ 180th ___ TRIAL DATE: 3-2-81

DEFENDANT: JOSEPH BERNARD NICHOLS

ALIAS: "JO JO" Nickerson

CAUSE NO.: 323 836 OFFENSE: Capital Murder

OFFENSE DATE: 10-13-80

POLICE AGENCY H.P.I.

O.R. NO.: 10049380 RACE: B SEX: M

D.O.B.: 9-8-61 SOC. SEC. #467-39-0965

F.B.I. NO.: OTHER I.D.:

CHECK NEEDED ITEMS:		ORDERED	RE-CEIVED
(a)	✓ ARREST RECORD (Rap sheet) 31348 W-5 F.B.I., D.P.S.	2-2-81	[illegible]
(b)	PEN PAPERS (Location)		

(c)	✓	OFFENSE REPORT (Agency & No.) HPD R-43538 2-9-81 WEIMER, TEX	2-5-81 2-2-81	[illegible]
(d)		LAB REPORTS (Agency & No.)		
(e)	✓	BALLISTICS REPORT (Agency & No.) ON .380, SLUGS & HULLS	2-2-81	[illegible]
(f)		SEARCH WARRANT (Court, Judge, & Date)		
(g)		FINGERPRINT COMPARISON (Agency & No.)		
(h)		AUTOPSY REPORT (Deceased's name & date of death)		
(i)		AUTOPSY PHOTOS (Need three week notice)		
(j)	✓	SCENE PHOTOS (Agency & No.)	2-2-81	[illegible]
(k)		BOOKING PHOTOS (Arrest No. & Date)		
(l)	✓	LOCATE WITNESS (Attach File)		

TERESA MCGEE – 7605 PHOENIX #826 – J.R. HARRISON KNOWS WHERE SHE IS.

(m)	✓	CERTIFIED COPY OF JUDGMENT & SENTENCE IN CA. NO. 314,084 – ROBBERY IN 208th		
✓	(n)	TAPE RECORDING OF STATEMENT MADE BY NICHOLS TO ANDERSON ON 2-2-81 REC 2-3-81		

(o) ✓ CHECK WITH WEINER, TX. P.D. Δ IS SUPPOSED TO HAVE SOME CHARGES THERE. AUTO THEFT INOT. 11-12-80 PEND. COLO. CO COLUM

(p) CHECK WITH COLORADO CITY, TX P.D. Δ HAS AN AUTO THEFT CASE THERE. NOTHING – COLO. CITY P.D.

(q) ✓ WHO IS Δ's PROBATION OFFICER IN 208th – GEO BROWN WAS A PS.I. RUN? IF SO, GET COPY FROM PROB. OF OFFICER NO. 2-2-81

(r) SEE ME FOR EXTRANEOUS ROBBY IN FORMATION

(s) HAVE 2 LARGE POSTERS MADE OF INSIDE & OUTSIDE OF STORE – RE: PAGES 11 & 12 OF O/R. ORD. 2-4-81

RECEIVED BY: Gregory

(INVESTIGATOR) 177 DATE RECEIVED: 1/28/81

ASSIGNED TO: Harrison [Illegible]

(INVESTIGATOR) 178 DATE ASSIGNED: 2-2-81
1/28/81

FILE RETURNED [ILLEGIBLE]

EXHIBIT E

Affidavit of Cindy Johnson

State of California

County of San Diego

My name is Cindy Johnson. I currently reside in an apartment at 5550 Balboa Arms, San Diego, California. I moved to San Diego in the spring of 1989. I do not have a phone or address listing in my name, and have not had a listing since my arrival in San Diego. My phone number is 619/278-6771. I am over eighteen years of age, I have never been convicted of a crime, and I am competent to make this affidavit. All facts stated herein are based on my personal knowledge.

1. On October 13, 1980 I was employed at Joseph's Deli on Fannin Street in Houston, Texas. I was present at Joseph's Deli when Claude Shaeffer was killed, and I witnessed the robbery and shooting. I testified for the state in two different capital murder trials against Joseph Nichols.

2. On the day of the crime, I made a signed statement describing what I saw. A copy of that statement is attached to this affidavit as "Exhibit A." I was not comfortable making a statement so soon after everything happened, because all that day I was extremely upset over what I had been through. I wanted to take some time so I could remember everything more clearly, and communicated these reservations to the authorities.

3. Two men came in that morning to rob the store. I later learned that the one who was shorter and had lighter skin was named Joseph Nichols. I remember he looked very scared and nervous. When the men pulled their guns

out, Mr. Shaeffer squatted down behind the cash register. It looked like he was going for his gun. The tall dark skinned guy standing further away from me, who I now know as Willie Williams, said something like, "don't go for the gun" when he squatted down.

4. When Claude Shaeffer started to come up from his squatting position, right after the tall guy (Williams) told him not to reach for the gun, Nichols fired his gun. I remember very clearly that this was the first shot fired, and that it was the only one fired by Nichols. After that shot, I saw the taller guy (Williams) lean across over the counter, and shoot his gun down at Mr. Shaeffer. This is the shot that went through Mr. Shaeffer's chest and killed him.

5. I was so scared during all the shooting that I just stood there frozen until the men left the store. After they left I hid in the restroom, and while I was in there I heard someone come back into the store and then immediately leave again after firing another shot. A few minutes after that shot, I ran down the street to call the police.

6. A few months after the murder, I spoke with Assistant District Attorney Ira Jones about the case. We talked about my knowledge of the crime on a few different occasions. I told him that since there had been time for me to think about the crime more clearly, I was able to remember more details about it. I told him about all the things that I had remembered since the day of the shooting, including the details about Nichols firing the first shot and the other man (Williams) leaning across the counter and firing the shot that killed Mr. Shaeffer.

7. I asked if I could add these things that I remembered to my original statement, but Ira Jones never

allowed me to do that. I assumed there was some legal reason that I could not add to my statement. I never told any of what I knew to the defense attorneys. Shortly before the second trail, the defense lawyers approached me asking if they could talk to me. One of the assistant district attorneys approached us and asked what the defense lawyers wanted to talk about. I was instructed to answer the defense lawyers' questions regarding the money box that was taken in the robbery, and not to discuss anything else.

8. I believe that Ira Jones was not truly interested in certain things that I could remember about the crime. Sometimes I would tell him details about what I saw, and he would just ignore what I said and start talking about something entirely different. He seemed to pay attention only to the things that he wanted to hear, and didn't want to discuss anything else. This was especially true when we went over my testimony for the second trial. Although we rehearsed my testimony for the first trial, Ira Jones coached me especially strongly for the second trial. He seemed to have a very clear and specific idea of what he needed me to say for the second trial, and did not care about the things I knew which didn't fit with what he wanted.

9. I felt hassled and harassed by Ira Jones throughout my involvement in the case. He didn't seem to care at all about what I had been through, and seemed to have a selfish attitude whenever he dealt with me. Ira Jones was overall very insensitive and inconsiderate towards me whenever we talked.

10. I clearly remember that Joseph Nichols, the shorter and ligter [sic] skinned of the two men, did *not*

shoot Mr. Shaeffer in the chest. It was the other, darker skinned and taller man, that killed Mr. Shaeffer.

I have read the foregoing affidavit, numbered paragraphs 1 through 10, and swear that it is true and correct to the best of my personal knowledge.

/s/ Cindy A. Johnson
Cindy Johnson

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned authority, on this 9th day of April, 1992, to certify which witness my hand and seal of office.

[SEAL] OFFICIAL NOTARY SEAL VICTOR LINSON Notary Public – California SAN DIEGO COUNTY My Comm. Expires SEP 16 [Illegible]	/s/ Victor Linson Notary Public in and for The State of CALIFORNIA

Exhibit F

5:40 P.M.

Your Juror Number 5-01

1. Your name BEN EVANS JR.
2. Home address 4407 ELYSIAN
3. Home phone number 692-3154 Business phone number
4. Your age 62 City and State of Birth Brookshire Texas
5. Single? ____ Married? ✓ Widow? ____ Divorced? ____
6. Ages and sex of children, if any (5)
7. Length of residence in Harris County 42 years.
8. City and State of previous residence ____
9. Your occupation Longshoreman
10. Employed by West Gulf Maritime
11. How long so employed 21 Yrs
12. Prior employer Utility Sup. Co.
13. How long so employed ____
14. Name of husband or wife MARIE EVANS
15. His or her occupation MAID
16. His or her employer ____
17. Where attended high school Brookshire Graduate? Yes
18. Attend College or University ____ If so, where? ____
    How many years? ____ Graduate? ____ Major ____
19. Military Service? Yes If so, branch, rank & when Army Sgt. WW2
20. Religious preference None
21. Have you or any member of your family ever been the victim of a crime? ____. If so, what kind? ?
22. Have you or any member of your family ever been a witness in a criminal case? Yes
23. Have you or any member of your family ever been a defendant in a criminal case? ?
24. Have you ever served on a jury? No
    Civil? ____ If so, when and the kind of case ____
    Criminal? ____ If so, when and the kind of case ____
25. Have you ever served on a grand jury? No If so, when and where ____
26. List fraternal, social, and civic club memberships ____

could not convict anyone unless convicted himself

Challenge for Cause 11-1-11

opposed to Death Penalty but can answer questions

Foster Boys arrested 2 weeks ago

BEST AVAILABLE COPY

EXHIBIT G

APPELLATE COURT NO. ___

IN THE COURT OF APPEALS

OF THE STATE OF TEXAS

(Filed Apr. 4, 1983)

JOSEPH BERNARD NICHOLS,

Appellant,

VS.

THE STATE OF TEXAS,

Appellee.

APPEAL FROM 178th DISTRICT COURT
OF HARRIS COUNTY, TEXAS

Judge Dan E. Walton, Presiding

ARGUMENTS

VOLUME 25 OF 29 VOLUMES

Kaye G. Jameson
Official Court Reporter
301 San Jacinto
Houston, Texas 77002

* * *

[58] and would stop on his way down and neatly tuck the gun under there and then die for you? Unh-unh. You die, you just collapse and drop the gun.

The defense admits that Willie couldn't find it. Because it didn't happen that way.

Ladies and gentlemen, from this evidence beyond a reasonable doubt Joseph Bernard Nichols is guilty of a capital murder. Their sole defense rests on the word of a killer that doesn't match the physical evidence. He is lying by physical hulls alone, not to mention the fact that the doctor says it couldn't have happened that way.

You can turn him loose if you want to believe that killer. All you got to say is that it wasn't reasonable for Jojo to have anticipated this was going to happen or that the murder wasn't done in the furtherance of the conspiracy. Well, you know it was. There is the cash box. That's what they came in for. That's what they got.

Was it reasonable to anticipate? It was anticipated. Jojo brought a gun. It was loaded. He fired it. And I submit to you from this evidence, he fired the fatal bullet and killed the man in cold blood and he should answer for that.

Under this law of parties if you will [59] apply it as the law instructs you, the man is guilty.

Ladies and gentlemen, the only way crime and criminals stop is for us to somehow catch them, then bring them into this courtroom one by one, trial by trial, submit the evidence to juries. The police have done all they can do. They did a good job. I'll admit that. If you believe they're guilty, it is your duty to convict them. It is your duty to enforce the law if you think they're guilty. You bet you. Because if you don't, nobody does and the guys walk out the door and go back to killing and robbing.

How many times have you sat in your den, in your kitchen, you're reading the paper, you were watching television and you know what's going on in this community. It's a

crime wave. How many times have you said to yourself why don't they do something. Why don't they do something. You are the they. If you don't do something, nothing is going to get done. The buck stops on that jury rail. I ask you to render a verdict that you will be proud of all the days the rest of your life. You can look in the mirror and you can say when I had my chance, I stood up and I was

* * *

EXHIBIT H

APPELLATE COURT NO. ___

IN THE COURT OF APPEALS

OF THE STATE OF TEXAS

(Filed Apr. 4, 1983)

JOSEPH BERNARD NICHOLS,

Appellant,

VS.

THE STATE OF TEXAS,

Appellee.

APPEAL FROM 178th DISTRICT COURT
OF HARRIS COUNTY, TEXAS

Judge Dan E. Walton, Presiding

ARGUMENTS

VOLUME 27 OF 29 VOLUMES

Kaye G. Jameson
Official Court Reporter
301 San Jacinto
Houston, Texas 77002

* * *

[40] love him. Most of them are his relatives. Those people would never ask you to give Joseph what he's got coming. They would ask you for another probation if you had the power to give it. They are parents first and it's their job.

It's the way they ought to be. I would do the same thing. Get that done and get that out of your system.

Then I think possibly for a second you ought to be thankful that the State did not choose to show you the grief and the misery of the other family involved in this, the Shaffer family. We could have put Mrs. Shaffer right there on that stand and let you watch her cry. We could have asked her what Jojo Nichols has done to her life forever. I could have asked her who is going to love you the rest of your life. Who is going to take care of you in your old age. Surely it's not going to be Joseph Nichols. We chose to spare you that because it is our duty and your duty to look solely at the evidence and not cry for either side.

My duty as before is only to summarize evidence and ask you to make a reasonable deduction from it. The defense arguments I'll briefly touch on.

Mr. Scott argued to you about the path [41] of the bullet this time. You recall on the question of guilt he sincerely argued to you that that bullet came from the door. They had themselves twisted sideways just to where it would come from the door. Now they have shifted gears that you don't believe that and now they want the shot to come over here from the counter from Willie Ray Williams. Aren't you offended by that? Wouldn't you be offended for a State's attorney to stand up here and shift and twist and blatently [sic] change the proof around? There is something very wrong with that. I submit to you that you should be offended by that. Does it ever end?

They talk to you about these other offenses. They denied to you that Joseph Bernard Nichols was involved in this murder. Now they want you to pretend that all of his

other crimes are just fantasies, those really didn't happen. Grand juries have indicted them just as he was indicted in this case.

Please understand that when I cross examined Oscar Nino about that rape, I'm not accusing Joseph of being involved in that. That's Oscar Nino's, part of his plan. There is a woman lieutenant there in charge of that.

EXHIBIT I

APPELLATE COURT NO. ___

IN THE COURT OF APPEALS
OF THE STATE OF TEXAS
(Filed Apr. 4, 1983)

JOSEPH BERNARD NICHOLS,

Appellant,

VS.

THE STATE OF TEXAS,

Appellee

APPEAL FROM THE 178TH DISTRICT
COURT OF HARRIS COUNTY,

TEXAS

Judge Dan E. Walton, Presiding

STATEMENT OF FACTS

VOLUME 24 OF 29 VOLUMES

Kaye G. Jameson
Official Court Reporter
178th District Court
Harris County, Texas

* * *

[954] mind placing a "W" right there where you stood by that cash register?

A. Yes, sir.

Q. That's where you were standing. Now, would you please place a "J" where Jojo was standing? Which of these steam tables was he standing by?

A. This one.

Q. Now, here is an "X" where the man that was shot was standing. Is that basically where he was?

A. Yes, sir.

Q. Behind that cash register?

A. Yes, sir.

Q. Okay, sir, would you please have your seat. So you're in front of the cash register and Jojo is off down there by the steam table; is that correct?

A. Yes, sir.

Q. Who pulled their gun first?

A. Jojo threw down first.

Q. Jojo threw down first?

A. Yes.

Q. And after that you pulled out your gun; is that correct?

[955] A. Yes, sir.

Q. Who fired first?

A. Joe fired first.

Q. How many times did Jojo fire?

A. Once.

Q. After Jojo fired, what did the man behind the counter do?

A. He was in a squatting position.

Q. Do you know whether or not he was hit?

A. No, sir, he wasn't hit.

Q. Well, are you saying you know that for sure?

A. Yes, sir,

Q. Well, you just didn't see any blood?

A. He didn't go down. I didn't see no blood, and he didn't go down.

Q. Did you try to shoot standing by that cash register?

A. Did I shoot standing by the cash register?

Q. When you were standing there, did you try to shoot? You said that your gun snapped.

A. Yes, sir.

Q. Did you pull the trigger on your gun by the cash register?

EXHIBIT J

CAUSE NO. 323,836

STATE OF TEXAS	IN THE 178TH
VS.	DISTRICT COURT OF
JOSEPH BERNARD NICHOLS	HARRIS COUNTY, TEXAS

APPEARANCES:

For the State:	Mr. Ira Jones Assistant District Attorney Harris County, Texas
For the Defendant:	Mr. E. Neil Lane Mr. Robert Scott Attorneys at Law Houston, Texas

BE IT REMEMBERED that upon this the 11th day of January, A. D. 1982, the above entitled and numbered cause came on for motions before the Honorable Dan E. Walton, Judge of the 178th District Court of Harris County, Texas; and the State appearing by counsel and the Defendant appearing in person and by counsel, announced ready for motions, and all preliminary matters having been disposed of, the following proceedings were had, viz:

* * *

[4] voir dire last time. And at that time, there was some information that he had committed other offenses for which he had not been indicted.

In checking the records, we find that he has not been indicted again, but we would still like to know if there are any other extraneous offenses which the State intends to

use in this case. We would like to have some information about those.

THE COURT: Mr. Lane, you're referring to motions that were presented prior to or during the previous trial of this matter?

MR. LANE: Yes, Your Honor.

THE COURT: Well, the Court would order that it be made a part of the record of this trial all motions that were previously filed in this matter, either prior to the previous trial or during the previous trial, and the Court's rulings remain the same thereon. And I take it the record reflects any exceptions that were taken to the rulings of the Court with respect thereto. It would be part of the record of this case.

MR. LANE: Yes, sir, we would like to re-urge those exceptions at this time, Your Honor.

THE COURT: The Court's ruling on such [5] matters remains the same.

MR. LANE: Additionally, Your Honor, we would like to know if there are any other witnesses other than those that have been subpoenaed at this time that the State intends to use.

THE COURT: On direct proof in the matter?

MR. LANE: And would the State be bound by those witnesses that are subpoenaed at this time?

THE COURT: Well, have all witnesses been enumerated on the subpoena request, Mr. Jones that the State proposes to use upon direct proof in this case?

MR. JONES: Only the direct, the case in chief, Your Honor, on the question of guilt.

Your Honor, just as the defense has wanted all of their motions to be brought forward into the retrial of this case, likewise the State would want its subpoenas and witness list to be brought forward from that prior hearing into this case.

THE COURT: Well, as I understand it, you've issued process now for the witnesses you

* * *

EXHIBIT K

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOSEPH BERNARD NICHOLS	*	CIVIL NO. H-92-36
	*	
Versus	*	Houston, Texas
	*	March 19, 1992
JAMES A. COLLINS	*	10:00 a.m.

EVIDENTIARY HEARING
BEFORE THE HONORABLE DAVID HITTNER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Petitioner:

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Court Reporter:

Fred Warner
515 Rusk Avenue
Houston, Texas 77002

Proceedings recorded by mechanical stenography, produced by computer-aided transcription.

* * *

[28] counsel. I am just looking at what obviously is something that's missing, all right.

If there is anything else, you have heard what Mr. Kuhn's position is, they have done their homework and so have you, apparently he has come up with some things he got yesterday and some of its missing. I want to know why, in effect, even though that was sealed up and he just got it, if there is anything written on the back, why the back wasn't xeroxed.

MR. WALT: We will check on that.

THE COURT: What are we doing here? We are here for me to make a decision to either stay this execution, to order a new trial or to order the man executed and send it up to the circuit. I mean, that's bottom line. How much time do I have? I am trying to do the best I can to get you in, and now it looks as if who you were dealing with apparently is not xeroxing the back of some documents.

MR. KUHN: Also Exhibit 6 – and, Judge, I passed up to you a copy of the letter that indicated the reason for the concern over Teresa McGee.

THE COURT: I am familiar with that. I have read all your papers.

MR. KUHN: Exhibit 6.

MS. PARKER: I am sorry to interrupt you. Before Exhibit 6, I believe that was my copy.

(2)

Supreme Court, U.S.
FILED
AUG 8 - 2003
OFFICE OF THE CLERK

No. 02-1802

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH BERNARD NICHOLS,

Petitioner,

v.

THE STATE OF TEXAS

Respondent.

On Petition for Writ of Certiorari
To the Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the State suppressed exculpatory evidence.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Nichols is a Texas death-sentenced inmate seeking a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals denying and dismissing his state habeas corpus petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional provisions on which Nichols relies, this case also involves Article 11.071 of the Texas Code of Criminal Procedure. Section 5 of Article 11.071 provides, in relevant part, as follows:

> (a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:
>
> > (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;
> >
> > (2) by a preponderance of the

> evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071 or 37.0711.

Tex. Code Crim. Proc. Ann. art. 11.071 § 5(a) (Vernon Supp. 2002).

STATEMENT OF THE CASE

Nichols was convicted of capital murder and sentenced to death on March 10, 1982, in cause number 323836 in the 178th District Court of Harris County, Texas. The Court of Criminal Appeals affirmed, and this Court denied his petition for writ of certiorari. *Nichols v. State*, 754 S.W.2d 185 (Tex. Crim. App. 1988), *cert. denied*, 488 U.S. 1019 (1989). Nichols then sought state habeas corpus relief. Following an evidentiary hearing, the trial court recommended that relief be denied, and on December 12, 1991, the Court of Criminal Appeals denied the writ. *Ex parte Nichols*, No. 21,253-01.

Nichols next ventured into federal court, where he succeeded in obtaining partial relief. *Nichols v. Collins*, 802 F. Supp. 66 (S.D. Tex. 1992). The State appealed; the United States Court of Appeals for the Fifth Circuit reversed, and this Court denied certiorari. *Nichols v. Scott*, 69 F.3d 1255 (5th Cir. 1995), *cert. denied sub nom. Nichols v. Johnson*, 518 U.S. 1022 (1996).

Nichols returned to state court and filed another state writ application. The trial court found that it was a successive petition and forwarded it to the Court of Criminal Appeals. The Texas high court agreed with the trial court's determination except as to Nichols's *Brady* claim and remanded for consideration of the merits of that allegation. Following a second evidentiary hearing, the trial court made findings of fact and conclusions of law and recommended that relief be denied. On

March 12, 2003, the Court of Criminal Appeals denied the writ based on the trial court's findings. *Ex parte Nichols*, No. 21,253-02.

STATEMENT OF THE FACTS

I. Facts of the Crime

About 9:00 a.m. on the morning of October 13, 1980, Nichols, Willie Ray Williams (Williams), Charlotte Parker (Parker), and Evelyn Harvey (Harvey) drove to a spot in front of an apartment building near Joseph's Delicatessen and Grocery in Houston, Texas. Nichols and Williams mutually intended to rob this establishment, Nichols having suggested it as a target. Williams was armed with a .380 semi-automatic pistol; Nichols had a snub-nosed .38 revolver. Parker parked the car and Nichols and Williams got out and entered the deli. After entering, Nichols and Williams first went to the back of the store, and then approached the counter. Nichols got a corndog. Williams set a quart of beer on the counter near the cash register. Behind the counter was deli employee Claude Shaffer, Jr. (Shaffer). Nichols, and then Williams, each drew their respective pistols and pointed them at Shaffer.

When Shaffer saw the guns he began to bend over or squat down. Nichols then said something to the effect of "don't go for the gun" or "don't be doing it." Nichols then shot at Shaffer, and immediately thereafter Williams pulled the trigger on his gun, but it is unclear whether it then discharged. Shaffer then either fell or squatted down behind the counter. Nichols and Williams ran to the door. Nichols exited. Williams either exited or partially exited and then, according to his testimony at Nichols' trial, turned and fired once at Shaffer, who was still squatting behind the counter. Williams testified that Shaffer fell back, that he (Williams) went behind the counter to Shaffer, turned him over, grabbed the deli's cash box, and ran

out of the deli, carrying his gun and the cash box. He was picked up by Parker and Harvey, got into the car with them, and they drove around the side of the deli building where they saw Nichols, who then got in the car with them. Harvey testified that Nichols told them "he had shot the man" and "he thought he shot him in the chest," and that Williams said he had run back into the deli and shot the man. Parker testified that Nichols said "I think I hit him in the chest," and that Williams said "he [Williams] shot the man in the shoulder." A few days later, Williams, Nichols, Parker, and Harvey were arrested.

The testimony of the Harris County Medical Examiner, Dr. Espinola, established without contradiction that Shaffer died from a single gunshot wound that entered his "left upper back about seven and three fourths [inches] to the left of the midline and three and one half inches below the top of the shoulder" and exited--without hitting any bones or "hard objects" within the body--"on the right side of the chest, 18 and one half inches from the right of the midline and 11 inches below the top of the shoulder." The wound would have caused "almost immediate disability" or "collapse." Shaffer also had a superficial two and a quarter inch slanting laceration on the right side of his head, which was "consistent with a grazing type of gunshot wound" and "could also be consistent with a person that hit their head on the corner of an object or anything like that in a fall." The head wound was not disabling. No bullet or bullet fragment was found in or on Shaffer's body. Two empty .380 cartridge cases--ejected from Williams' pistol--were found in the deli, as was also a whole .380 brass-jacketed projectile or bullet, which had been fired from Williams' weapon. A whole, unfired .380 brass-jacketed bullet and cartridge (with firing pin

> indentation on the cartridge rim) was found just outside the deli door. Lead bullet fragments were found on the inside of the deli door and near there on the floor along with brass jacket fragments. Also found in the deli--in a stack of comic books behind the counter--was a whole lead bullet that had been fired from a .38-caliber weapon. This was a revolver-type bullet that had never been jacketed.

Nichols v. Scott, 69 F.3d at 1259-60 (footnotes omitted).

> At the close of the evidence on the guilt/innocence stage of the trial, the trial court extensively instructed the jury on the Texas law of parties such that the jury could, depending on what else it found, find Nichols guilty as charged for either having fired the fatal shot or for the fatal shot fired by Williams, if that was done pursuant to and in furtherance of their conspiracy to rob the deli and should have been anticipated by Nichols as a result of carrying out the conspiracy. The defense argued, as it had at Nichols' first trial, that Williams fired the fatal shot from the deli door as he exited and came back in, and that this was, in the words of the charge, "the separate act of Willie Ray Williams acting independently," for which Nichols would not be responsible. The state primarily argued that Nichols fired the fatal shot. *But,* it also argued extensively, in the alternative, that even if Williams had fired the fatal shot, Nichols was guilty of capital murder under the law of parties.

Id. at 1262 (original emphasis, footnotes and parenthetical omitted).

II. Facts Relating to Punishment

At the subsequent punishment phase the state submitted evidence that Nichols had been convicted of

> theft in 1979, and had pleaded guilty in May 1980 to an April 1980 robbery for which he was sentenced in July 1980 to nine years' felony probation, which he was serving when he committed the instant offense. Additionally, it was shown that on August 15, 1980, Nichols committed an armed robbery of a convenience store, shooting the clerk in the shoulder when he did not respond speedily enough to Nichols' demand for more money. Nichols continued to demand more money as the clerk was bleeding from his wound. Further, on October 11, 1980, two days before the present offense, Nichols committed another robbery of a convenience store, aiming his pistol at the clerks. There was also evidence that when booked into jail following his arrest for the instant offense, Nichols had stated that he would "shoot any deputy that got in his way." Finally, there was evidence that in June 1981, while in jail awaiting trial, Nichols conspired with others to engage in an escape involving the use of a firearm and other weapons. The defense called fifteen witnesses. Many testified they thought Nichols could be rehabilitated, that he was nineteen at the time of the offense, and that at school he had had average grades, had been an excellent athlete, and had presented no disciplinary problems. His parents divorced when he was seven, but both maintained a good relationship with him. He married, and dropped out of school, at about age seventeen to support his young child. His parents thought he had gotten into trouble due to the pressure he was under to support his young child and because he got in with a bad crowd.

Id. at 1263.

III. Facts Relating to the Issues Presented

In addition to Nichols, Williams, and Shaffer, there were two

other persons present when the murder was committed – delicatessen employees Cindy Johnson and Teresa Henry, who later changed her name to Ishman when she married ("Ishman").

A. Cindy Johnson

On the day of the offense, Johnson gave the police a statement. Petitioner's Exhibit A. Therein, she averred, *inter alia*, that Shaffer was reaching for his gun when he was shot; that both robbers then shot him; and that after they departed, one of the robbers returned and fired another shot and grabbed the cash box.

Johnson testified at trial that she did not see Shaffer reaching for a gun when he was shot. The defense impeached her with her written statement; Johnson "admitted making the statement, but said that although Shaffer 'went down in a squat position,' she 'didn't see him reach for anything.'" *Nichols v. Scott*, 69 F.3d at 1287. In addition, Johnson also testified that when Nichols and Williams shot at Shaffer, Ishman "was back in the kitchen or bathroom and did not come out." *Id.* at 1286.

On April 9, 1992, Johnson executed an affidavit offering a version of events that was consistent with her original statement. Petitioner' Exhibit E. She averred that when Shaffer squatted down, "[i]t looked like he was going for his gun;" that Nichols shot first, and that Williams then fired the killing shot; and that she hid in the restroom after the first shots were fired and heard (but did not see) someone return and fire another shot.

B. Teresa Ishman

Immediately after the shooting, Ishman "was uncooperative, claimed not to have seen anything, was fired by the owner, and left the scene before the first officer arrived on the scene . . . ." Petitioner's Appendix. 72, 88.

On April 12, 1992, Ishman executed an affidavit describing her

observations of the events that led to Shaffer's death. Respondent's Appendix.[1] She averred that she saw Nichols and Williams enter the store and that she recognized Nichols because she "had seen him before." App. 1. She saw Shaffer reach for his gun, and Williams said "something like, 'don't go for the gun!'" Immediately afterward, "shots started firing. I turned and ran towards the back of the store." App. 2.

C. Materiality

Nichols did not raise a *Brady* claim on federal habeas review, but did allege ineffective assistance of counsel, based on the Johnson and Ishman affidavits, for not adequately interviewing these witnesses. *Nichols v. Scott,* 69 F.3d at 1286. In rejecting this allegation, the Fifth Circuit noted that

> the Ishman affidavit states that she initially told the police that she saw nothing. This was consistent with Johnson's testimony that when Nichols and Williams shot at Shaffer, the other deli employee there–Ishman (then known as McGee, which was not her true name)–was back in the kitchen or bathroom and did not come out. As to Johnson, defense counsel had already reviewed–and at trial succeeded in getting before the jury–her written, sworn statement to the police, and there was nothing to indicate that she had ever said anything else, much less anything favorable to the defense. Nor do the April 1992 affidavits show a probability of a different result sufficient to undermine confidence in the outcome. Johnson's affidavit reflects that just after Nichols shot, and *before* either Nichols or Williams left, she saw Williams "leaning across the counter and firing the shot that killed Mr. Shaeffer (sic)." This entirely contradicts the defense theory that

---

[1] It is interesting that while Nichols relies heavily on Ishman's affidavit, he did not include it in the lengthy appendix to the petition for writ of certiorari.

> the fatal shot was fired by Williams from the door after Nichols left and thus was "the separate act of" Williams "acting independently" for which under the charge Nichols would not be responsible. Ishman's affidavit mentions only an initial set of shots fired from the counter area (after which she ran into the restroom, where Johnson "was already locked in"). Ishman does state Shaffer "went down and reached under the counter for his gun," but this is just what Johnson's October 13, 1980 statement–which was before the jury without limitation–said. In Johnson's trial testimony, she admitted making the October 13, 1980, statement, but said that although Shaffer "went down in a squat position," she "didn't see him reach for anything." Nichols' statement and Williams' testimony, both before the jury, were that Shaffer came up with a gun in his hand.

Id. at 1286-87 (original emphasis, footnotes omitted).

After the Court of Criminal Appeals remanded for merits review of Nichols's *Brady* claim, the trial court found that the evidence was not material and, alternatively, that Nichols did not exercise due diligence in attempting to locate Ishman. Petitioner's App. 104-05.[2] Specifically, the court found that Nichols "fails to show the materiality

---

[2] Nichols misrepresents the record in asserting that the state habeas court found that "Ishman's testimony is material." Petition at 12 (citing Petitioner's App. 61, finding 8(C)). The finding to which he refers is as follows: "Evidence that corroborates a defendant's version of the facts is material and favorable: 'Logic dictates that evidence from a disinterested witness corroborative of the defendant's version of events would be favorable to the defendant.' *Flores v. State*, 940 S.W.2d at 192." In fact, as discussed throughout this brief, the state courts expressly rejected Nichols's *Brady* claim for lack of materiality.

In addition, Nichols's Appendix C is misdated and incomplete. It contains only forty-six of the fifty-four fact findings made by the state habeas court. It also states that it was filed on May 13, 1998, when in fact it was signed on April 9, 2001.

of any undisclosed information" and "fails to show that any undisclosed information . . . is material in light of the entire record." The Court of Criminal Appeals denied relief based on the trial court's findings and conclusions, in particular the finding that Nichols had not met the materiality prong of *Brady*. Petitioner's App. 2.

ARGUMENT

I. The Question Presented for Review Are Unworthy of the Court's Attention.

Rule 10 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are truly compelling reasons therefor. Nichols advances no compelling reason in this case, and none exists. Further, the issues in this case involve only the application of established constitutional principles to the facts, *i.e.*, whether the state courts correctly found that the State did not suppress exculpatory evidence. Thus, the petition presents no important question of law to justify this Court's exercise of its certiorari jurisdiction.

In addition, because there is no constitutional right to state habeas corpus proceedings, it follows that the denial of state habeas relief does not present a federal question for certiorari review:

> A post-conviction proceeding is not part of the criminal process itself, but is instead a civil action designed to overturn a presumptively valid criminal judgment. Nothing in the Constitution requires the States to provide such proceedings . . . nor does it seem to me that the Constitution requires the States to follow any particular federal model in those proceedings.

Murray v. Giarratano, 492 U.S. 1, 13 (1989) (O'Connor, J., concurring). Similarly, certiorari review of state habeas decisions is even more inappropriate where, as here, a claim is ripe for federal habeas review. This is because

> this Court rarely grants review at this stage of the litigation even when the application for state collateral relief is supported by arguably meritorious federal constitutional claims. Instead, the Court usually deems federal habeas proceedings to be the more appropriate avenues for consideration of federal constitutional claims.

Kyles v. Whitley, 498 U.S. 931, 932 (1990) (Stevens, J., concurring).

Justice Stevens's observation is particularly relevant to this case, as on July 10, 2003, Nichols filed an amended petition in his previously dismissed federal habeas action raising the claims presented in his petition for writ of certiorari. *Nichols v. Cockrell,* No. 4:92cv00036. Given the pendency of that action, review should be denied to allow for consideration of his allegations in the "more appropriate" arena of federal habeas corpus.

II. Nichols's Allegation of Perjured Testimony Is Not Properly Before the Court.

The first and third questions presented in Nichols's petition for writ of certiorari involve, respectively, the materiality and suppression prongs of a claim that the State suppressed exculpatory evidence in violation of *Brady v. Maryland,* 373 U.S. 83 (1963). The second question concerns whether the State presented false testimony. Nichols is not entitled to review of this issue, however, because it was not raised in the court below. Even had Nichols presented this claim to the state courts, certiorari review nonetheless would be inappropriate, as all of Nichols's allegations other than his *Brady* claim were rejected on the basis of an adequate, independent state-law ground.

A. Claim not raised below

In the habeas petition the denial of which Nichols seeks review of in this Court, he raised four claims for relief: (1) suppression of exculpatory evidence, (2) unfairness in the State pursuing alternative

theories against Nichols and his co-defendant, (3) cumulative error, and (4) collateral estoppel. *Ex parte Nichols* at 17, 20, 27, 34. He made no allegation that the State presented false testimony. The cases are legion that this Court will not consider an issue that was not raised in the courts below. *E.g., McCleskey v. Zant*, 499 U.S. 467, 522 n.10 (1991); *United States v. Montoya de Hernandez*, 473 U.S. 531, 540 n.4 (1985). Because Nichols's claim of perjured testimony is presented for the first time in this Court, it is not an issue on which certiorari review should be granted.

B. Successive state habeas corpus petition

Moreover, even if Nichols's state habeas claims could somehow be construed as including an allegation of perjured testimony–which they plainly cannot–review nonetheless should be denied because the state courts dismissed all of his allegations except his *Brady* claim as an abuse of the writ. When Nichols filed his petition, the state trial court entered an order finding that it was successive. *Ex parte Nichols* at 96. In orders entered on April 16 and 30, 1997, the Court of Criminal Appeals for the most part agreed, finding that only the *Brady* claim was entitled to merits review and remanding for an evidentiary hearing limited to that issue. Petitioner's Appendix B. The effect of these orders was to dismiss the remaining claims as an abuse of the writ.

It is well settled that "this Court 'will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment.'" *Lambrix v. Singletary*, 520 U.S. 518, 522-23 (1997) (quoting *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)); *see also Harris v. Reed*, 489 U.S. 255, 262 (1989) (an adequate and independent state procedural default will bar federal habeas review of a claim absent a showing of cause and prejudice). This is so because the Court "in fact lack[s] jurisdiction to review such independently supported judgments on direct appeal: Since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory." *Lambrix*, 520 U.S. at 523 (citing *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945)); *see also Sochor*

v. Florida, 504 U.S. 527, 533 (1992) (noting and applying rule that "this Court lacks jurisdiction to review a state court's resolution of an issue of federal law if the state court's decision rests on an adequate and independent state ground"); *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) ("If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision").

The Texas Court of Criminal Appeals refused to review Nichols's claims on the basis of Section 5(a) of Article 11.071 of the Texas Code of Criminal Procedure, which forbids consideration of successive habeas petitions raising allegations for which the legal and factual bases previously were available. *See Moore v. Texas,* 535 U.S. 1110 (2002) (Scalia, J., dissenting). "There is no question that this procedural bar is an adequate state ground; it is firmly established and has been regularly followed by Texas courts since at least 1994." *Id.* (citing *Barrientes v. Johnson,* 221 F.3d 741, 758-59 (5th Cir. 2000)). *See also Fuller v. Johnson*, 158 F.3d 903, 906 (5th Cir. 1998); *Emery v. Johnson*, 139 F.3d 191, 195-96 (5th Cir. 1997). *A fortiori.* the Texas court's application of this rule to bar consideration of Nichols's claims likewise forecloses certiorari review by this Court.

III. The State Did Not Suppress Exculpatory Evidence.

In *Brady v. Maryland,* the Court held that "the suppression by the prosecution of evidence favorable to an accused after a request violates due process where the evidence is material either to guilt or punishment, irrespective of the good or bad faith of the prosecution." 373 U.S. at 87.

> The *Brady* rule is based on the requirement of due process. Its purpose is not to replace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. Thus, the prosecutor is not required to deliver his entire file to defense counsel, but only to

> disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial.

United States v. Bagley, 473 U.S. 667, 675 (1985). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. at 434.

Nichols alleges that the State suppressed (1) knowledge of Cindy Johnson's change in testimony as to whether Shaffer was reaching for a gun when he was shot, and (2) Ishman's whereabouts and her testimony impeaching Johnson. Petition at 18-22. As noted above, the state courts found that the evidence was not material and, alternatively, that Nichols did not exercise due diligence in attempting to locate Ishman. While Nichols challenges both holdings, it is not necessary to consider the latter issue, as his *Brady* claim plainly fails for lack of materiality. *E.g., Patterson v. Shumate*, 504 U.S. 753, 764 (1992) (generally, Court need not reach alternate ground when unnecessary to its disposition of the case); *Odem v. Hopkins*, 192 F.3d 772, 777 (8th Cir. 1999) (where one of *Brady* requirements is not satisfied, court need not address other *Brady* prongs).

Illuminating on the issue of materiality is *Strickler v. Greene*, 527 U.S. 263 (1999),[3] a capital case in which the only eyewitness to the victim's abduction was a woman named Anne Stoltzfus, who identified Strickler as being the ringleader of the perpetrators. At trial, she testified, *inter alia*, that she had "an exceptionally good memory" and had "absolutely no doubt of my identification." *Id.* at 272. After trial, it was discovered that the prosecution had failed to disclose documents that "cast serious doubt on Stoltzfus' confident assertion of her 'exceptionally good memory.'" *Id.* at 273. The Court nonetheless rejected Strickler's *Brady* claim for lack of materiality, noting that

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[3] Although *Strickler* considered materiality in the context of a "cause-and-prejudice" procedural default analysis, the standard is the same for the materiality prong of a substantive *Brady* claim. *Strickler*, 527 U.S. at 282.

"[e]ven if Stoltzfus and her testimony had been entirely discredited, the jury might still have" convicted him of capital murder and assessed a death sentence due to the strong case presented by the State. *Id.* at 292. "Notwithstanding the obvious significance of Stoltzfus' testimony, petitioner has not convinced us there is a reasonable probability that the jury would have returned a different verdict if her testimony had been either severely impeached or excluded entirely." *Id.* at 296.

Nichols fails to show materiality, for several reasons. As discussed above, the Fifth Circuit already has found, as a matter of law, that Johnson's and Ishman's affidavits are not material, *Nichols v. Scott,* 69 F.3d at 1286-87, a fact noted by the state habeas court in reaching the same conclusion. *Ex parte Nichols* at 44. These holdings are surely correct, as the allegedly suppressed evidence of which Nichols complains is of much less import than that in *Strickler* and falls far short of discrediting the State's case against him.

A. Guilt-innocence

Nichols attaches far too much significance to Ishman's averment that Shaffer was reaching for a gun when he was shot. "[T]his is just what Johnson's October 13, 1980, statement--which was before the jury without limitation–said." *Nichols v. Scott,* 69 F.3d at 1287. Thus, whether Shaffer was reaching for a gun was a contested issue that the defense was able to press even without the benefit of Ishman's testimony. *See United States v. Moreno-Morales,* 2003 WL 21512239 *7 (1st Cir. 2003) (materiality not shown where "new evidence . . . largely matches an account given soon after the incident (an account that was disclosed to the defense)"). Where, as here, impeachment evidence is merely cumulative of other evidence that was available to the defense, it is not material. *Knighton v. Mullin,* 293 F.3d 1165, 1177 (10th Cir 2002); *United States v. Thompson,* 286 F.3d 950, 967 n.9 (7th Cir. 2002); *Spence v. Johnson,* 80 F.3d 989, 995 (5th Cir. 1996).

Moreover, assuming *arguendo* that Shaffer was reaching for a gun, establishing that fact would not have aided the defense case on guilt-innocence. As the state habeas court found, under Texas law, "a

robber has no right to self-defense." Petitioner's App. 81 (citing *Davis v. State*, 597 S.W.2d 388 (Tex. Crim. App. 1980)).

Similarly, Johnson's statement not only was unhelpful to Nichols's defense, it in fact was extremely prejudicial.

> Johnson's affidavit reflects that just after Nichols shot, and *before* either Nichols or Williams left, she saw Williams "leaning across the counter and firing the shot that killed Mr. Shaeffer (sic)." This entirely contradicts the defense theory that the fatal shot was fired by Williams from the door after Nichols left and thus was "the separate act of" Williams "acting independently" for which under the charge Nichols would not be responsible.

Nichols v. Scott, 69 F.3d at 1287 (original emphasis).

Revealing of the tenuousness of Nichols's position is his contention that Ishman's statement impeached Johnson's testimony by showing that she could not have seen the shooting "because Johnson was locked in the bathroom." Petition at 22. While he relies on Johnson's testimony to establish that he did not fire the fatal shot, he makes the contradictory argument that Ishman's version of events proves that Johnson could not have seen anything.

Moreover, Ishman's affidavit shows that she herself did not see the shooting: "Right after [Williams said, 'don't go for the gun'], shots started firing. I turned and ran towards the back of the store." Respondent's App. 2. Likewise, Johnson averred that when Shaffer was shot, Ishman "was back in the kitchen or bathroom and did not come out." *Nichols v. Scott*, 69 F.3d at 1286. In short, Ishman says she saw the shooting and Johnson did not, and Johnson says just the opposite. Thus, Ishman's version of events was hardly devastating to the State's case. Moreover, it suffered at the state evidentiary hearing, as the state habeas court found that her testimony was seriously impeached. Petitioner's App. 76-77, 80-81, 103-04.

Even accepting Nichols's submission that Ishman could have established doubt about whose shot killed Shaffer, it would have availed Nichols nothing, because the jury was instructed on the Texas law of parties pursuant to which Nichols could be held criminally responsible for Williams's acts, as the state habeas court found. Petitioner's App. 80-81; *see Nichols v. Scott*, 69 F.3d at 1263. While "[t]he state argued primarily that Nichols fired the fatal shot[,] . . . . it also argued extensively, in the alternative, that even if Williams had fired the fatal shot, Nichols was guilty of capital murder under the law of parties." *Id.* Thus, Nichols's "guilt of capital murder did not depend on proof that he was the [shooter] . . . ." *Strickler*, 527 U.S. at 292. Regardless whose shot killed Shaffer, proof that Nichols aided and assisted in the offense "was sufficient under the judge's instructions." *Id.*

B. Punishment

Nor can Nichols show materiality with regard to the punishment phase of trial. As discussed above, in addition to the murder of Shaffer, the State offered evidence that Nichols was involved in a string of robberies, including another one in which he shot the clerk. In addition, he made death threats while in jail awaiting trial and also helped plan an escape that was to involve the use of firearms and other weapons. Thus, the jury was provided with ample evidence of his capacity for continued violence, including a robbery in which he undoubtedly was the shooter. On this record, the state habeas court quite reasonably found "that Ishman's 1992 affidavit and 1997 writ hearing testimony does not support a negative answer to the third special issue as to whether [Nichols's] conduct in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." Petitioner's App. 82.

CONCLUSION

For the foregoing reasons, the State respectfully requests that Nichols's petition for writ of certiorari be denied.

Respectfully submitted,

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AFFIDAVIT OF TERESA ISHMAN

Parish of Washington
State of Louisiana

My name is Teresa Henry Ishman. I currently reside at 731 May Avenue, in Boalusa, Louisiana. I do not have a telephone in my home. I am over eighteen years of age, and am competent to make this affidavit. All facts stated in this affidavit are within my personal knowledge.

1. In October of 1980, I was employed at Joseph's Delicatessan [SIC] on Fannin Street in Houston, Texas. I was hired mainly to serve food to the public at the steam table in the deli. I was working in the deli the morning that Claude Shaeffer [SIC] was killed during a robbery.

2. I was standing back behind the counter when the robbery and shooting occured [sic]. I remember that two black men walked in that morning. I recognized one of them, the guy with the light colored skin, because I had seen him before at a club in Houston. I found out later on that this man's name was Joseph Nichols. I remember that I had my eyes on him when he came into the store, because I knew I had seen him before.

3. When Joseph Nichols came up to get food from the steam table, I remember hearing the other guy say something about this being a robbery, or this is a stickup, or something like that. That guy, who was darker skinned, was standing directly across the counter from Claude Shaeffer [sic] at the cash register.

4. When he said that, I looked over at him and saw that he had a gun in his hand. Right then Mr. Shaeffer [sic] went down and reached under the counter for his gun, which he kept on a shelf underneath the cash register. I heard the darker skinned guy say something like, "don't go for the gun!"

5. Right after the dark skinned guy said that, shots started

firing. I turned and ran towards the back of the store. I was so scared running that I fell down on my way to the back. Cindy Johnson, who was also working that morning, was already locked in the restroom when I got back there.

6. When the shooting was all over, I went out to the front of the store. Mr. Shaeffer [sic] was lying there, and blood was everywhere around him. I left the deli and ran over to my sister s apartment. Around that time I was in trouble with the law in Louisiana, so I didn't want to have anything to do with talking to the police, and I didn't want to be involved at all. My sister told me to get back to the deli, and that I needed to tell the police what I saw. My sister went with me back to the deli.

7. When I got back to the deli, I got scared again. I told the police that my name was Teresa McGee, but I was so nervous that I gave them my real address and social security number when they asked for it. That day I told them that I hadn't seen anything when the robbery and shooting occured [sic].

8. A few days after the crime, someone from the district attorney's office in Houston came to my house, and said I'd need to go with him to his office to answer some questions. By that time the authorities had found out my real name, which was Teresa Henry. I got very upset, but I knew I needed to cooperate. I remember crying on the way over to the d.a.'s [sic] office.

9. I talked to a man in the d.a.'s [sic] office for about three hours. The whole thing was upsetting for me, and I remember the man I talked to was handing me tissues a lot during our conversation. Throughout the whole time we were talking, this man was taking notes on everything I said. In that conversation, I told him that I saw everything that happened during the robbery and shooting, up until the point that I turned and ran. I described to him everything that I witnessed.

10. At the time when I talked to the man in the d.a.'s [sic]

office, I already had planned on returning to Bogalusa. I was worried the man I was talking to was going to tell me that I had to stay around Houston to testify. I was very surprised when he told me that I was free to go, and that my involvement in the whole thing was through. The same man who drove me from my house to the district attorney's office took me back home.

I have read the foregoing affidavit, numbered paragraphs 1 through 10, and swear that it is true and correct to the best of my personal knowledge.

/S/ Teresa Ishman

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned authority, on this the 12th day of April, 1992, to certify which witness my hand and seal of office.

SIGNED: [Illegible]
Notary Public in and for the
Parish of Washington in
The State of LOUISIANA

No. 02-1802

(3)

SUPREME COURT, U.S.
FILED
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OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH BENNARD NICHOLS

Petitioner,

v.

STATE OF TEXAS

Respondent.

On Petition For A Writ Of Certiorari
To The Texas Court Of Criminal Appeals

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Texas Court of Criminal Appeals committed legal error when it rejected Nichols' *Brady* claim – (a) the State suppressed the location, identity and testimony of one out of two eyewitnesses to the murder, and (b) the State suppressed inconsistencies in the other eyewitness' testimony – on the grounds that the evidence was immaterial.

2. Whether the Texas Court of Criminal Appeals incorrectly applied this Court's well-established federal law regarding the State's presentation of false and misleading evidence by not conducting a harmless-error analysis.

3. Whether it was error for the Texas Court of Criminal Appeals to adopt the district court's conclusion that the undisclosed information could have been obtained by defense counsel's diligence, notwithstanding the fact that there was no reasonable basis for concluding that counsel for Nichols could have discovered the identity, location and testimony of the missing eyewitness prior to or during the trial.

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In Respondent's Brief in Opposition to Nichols' Petition for Writ of Certiorari (the "State's Brief"), the State sets forth two new issues: (1) the "Question [sic] presented for Review Are Unworthy of the Court's Attention"; and (2) "Nichols' Allegation of Perjured Testimony Is Not Properly Before the Court." *See State's Brief* at pp. 10-13. Both issues are without merit and should be disregarded by this Court. Additionally, in the State's reply to Nichols' *Brady* claim, the State relies on erroneous law and facts in an attempt to dissuade this Court from exercising its certiorari jurisdiction.

This Court should not be swayed by the State's smoke and mirrors attempt to draw attention away from the numerous wrongs committed during Nichols' trials. The Court should grant review to address the important issues of federal law improperly applied by the Texas Court of Criminal Appeals.

I. The Questions Presented For Review Are Worthy Of This Court's Attention.

The State contends that the issues presented in this case involve only the application of established constitutional principles to the facts; thus, "the petition presents no important question of law to justify this Court's exercise of its certiorari jurisdiction." *See State's Brief* at p. 10.[1] Such an assertion is unfounded and the questions presented are worthy of this Court's review.

This Court's certiorari jurisdiction is necessary when a state court decision is "contrary to ... clearly established Federal law, as determined by [this Court] ... if the state court arrives at a

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[1] Nichols did file his federal habeas petition in the Southern District Court of Texas for fear of running a foul of the AEDPA statute of limitations deadline. *See State's Brief* at p.11.

conclusion opposite to that reached by the Court on a question of law or if the state court decides a case differently than the Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). In the case at bar, the Texas Court of Criminal Appeals decision unreasonably applied clearly established federal law by allowing the following acts to go uncorrected: (1) the State's suppression of exculpatory and impeachment evidence that was material to Nichols' trials; (2) the State's presentment of knowingly false testimony and evidence to the trial court and the trier of fact; and (3) the Texas Court of Criminal Appeals conclusion that Nichols failed to show that the undisclosed information could not have been obtained by defense counsel's due diligence.

This Court's certiorari jurisdiction is triggered when determinations, such as those made in the case at bar, are clearly against established federal law. *Texas v. Cobb*, 532 U.S. 162 (2001) (granted certiorari and reversed the Texas Court of Criminal Appeals Sixth Amendment determination as against federal law). The State's assertion that this Court "rarely grants review at this stage of the proceedings" is unfounded. This Court is apt to grant review when wrongs continually plaque the state criminal justice system, as is happening in Texas. As a matter of fact, this Court will often grant review when the questions presented show a clearly erroneous application of well-established federal law. *Texas v. Cobb*, 532 U.S. 162 (2001) (certiorari granted on direct appeal from the Texas Court of Criminal Appeals); *Pennsylvania v. Finley*, 481 U.S. 551 (1987) (certiorari granted on direct appeal from the Superior Court of Pennsylvania).

The issues presented in this case involve the misapplication of clearly established federal law; thus, the petition presents an important question of law that justifies this Court's exercise of its certiorari jurisdiction.

II. Nichols' Allegations Of Perjured Testimony Are Properly Before This Court.

In the State's Brief, the State claims, among other things, that this Court should not review Nichols' question concerning the presentation of false and misleading evidence because this issue: (1) was not raised in the state court below; and (2) assuming *arguendo* that the claim was raised in the courts below, such claim is barred as a successive petition. *See State's Brief* at 11-13. Such assertions are neither grounded in fact or law and whether the State knowingly presented false testimony is correctly before this Court.

A. Nichols' false testimony claim was raised in the state habeas court.

The state habeas court agreed with Nichols' assertion that false testimony was presented during Nichols' second trial. *See* NMF 9 (finding "the State's presentation of evidence was known to be false"); NFF 32 (finding "when the State proffered its subpoena list, it listed the eyewitness as "McGee" when it admittedly knew that her name was Ishman); NFF 35 (finding "the State continued to allege that it could not locate "McGee," after the State knowingly extradited her to Louisiana). The state habeas court found that during Nichols' trial, the State made false statements to the jury by claiming that Johnson "ran to the back and stood back there with another woman that was back there, Teresa McGee." NFF 42(d)(ii).

Interestingly, instead of drafting one complete set of findings and conclusions, the state habeas court merely circled "GRANTED" or "DENIED" on the conclusions of law and findings of fact presented by Nichols and the State. As a result, Nichols did present its claim of false testimony which the state habeas court entered a ruling on by circling "GRANTED".

Additionally, Nichols presented its claim of false testimony to the Texas Court of Criminal Appeals. In Nichols' Objections to

the District Court's Conclusions of Law and Request for Habeas Relief filed with the Texas Court of Criminal Appeals, Nichols specifically requested a review of all of the state habeas court's fact-findings since they compelled a finding of a constitutional violation. The Texas Court of Criminal Appeals complied with Nichols request by addressing the fact-findings made by the state habeas court and concluding that from a review of "the record from [the] hearing" and "the trial court's findings . . . the relief sought should be denied." *See Nichols' Petition for Writ of Certiorari at Appendix A.* As evidenced by the Texas Court of Criminal Appeals decision, Nichols did present his claim of false testimony, which the court reviewed and denied.

If federal claims have been fairly presented to the state court, the petitioner has exhausted state remedies even if the highest state court does not actually rule on the merits of the claims. *See Picard v. Connor*, 404 U.S. 270, 276-77 (1971). The absence in the relevant opinion of the highest state court to any reference of the federal claim presented does not mean that the claim was not fairly presented in the state court. *Smith v. Digmon*, 434 U.S. 332, 333 (1978) (federal claim raised in petitioner's state court briefs, though not addressed by the state high court, was exhausted for state habeas proceedings). Simply because the Texas Court of Criminal Appeals failed to clearly address the issue of false testimony does not mean it was not raised in the state courts below.

It is clear that Nichols presented to the state habeas court evidence as well as findings of fact and conclusions of law relating to the State's presentation of false testimony, to which the state habeas court responded. Additionally, Nichols presented the entirety of the State's findings of fact and conclusions of law to the Texas Court of Criminal Appeals for review, to which the court responded. Both the state habeas court and the Texas Court of Criminal Appeals have responded to Nichols false evidence claim;

therefore, such conclusion has been exhausted and is ripe for this Court's review.

B. Nichols' false testimony claim is not a successive petition.

Within the State's Brief, the State concludes that the false testimony claim presented by Nichols is an "abuse of the writ" under Section 5(a) of Article 11.071 of the Texas Code of Criminal Procedure and should be dismissed. *See State's Brief* at p.13. However, this claim was not "previously available" as recognized by the Texas Court of Criminal Appeals April 30, 1997, order. The April 30, 1997 order reversed a decision made by the state habeas court finding "the instant application is a subsequent application." *See Appendix B.* Specifically, the Texas Court of Criminal Appeals determined that evidence relating to the suppression of Ishman "was unavailable" and could not be a subsequent application. *Id.*

The false testimony presented could not have been known since the false testimony presented referred to Ishman. Nichols asserts that the false testimony presented by the State was in connection with the presentation of the State's subpoena list knowing the information contained therein was false (the name and location of Ishman) and the presentation of testimony referring to "McGee" when the State knew her name was Ishman. Nichols could not have presented a false testimony claim in the first habeas proceeding since the information about Ishman was unavailable as acknowledged by the Texas Court of Criminal Appeals. *Id.* As such, the State's argument that Nichols' false testimony claim is successive is erroneous.

III. The State Did Suppress Exculpatory Evidence.

Nichols' federal habeas complaint centers on the suppression of Ishman, including the suppression of her identity, location, and prior testimony. The State's Brief erroneously

focuses on the Fifth Circuit determination during Nichols' first federal habeas proceeding to assert that Ishman was not material and that Johnson's and Ishman's affidavits were not material. *See State's Brief* at pp. 15, 16, and 17. The State's reliance is misplaced since this issue was not before the Fifth Circuit in the referenced proceeding.

> This [Ishman] issue is not properly before us. The [Ishman and Johnson] affidavits are not a part of the record (and no complaint has been made of the ruling denying the motion to expand the record); and they were tendered to the district court in respect to a *Brady* claim [that was preserved for later review]. . . . There was no allegation concerning Johnson or Ishman or the subject matter to which their affidavits are now alleged to be relevant. These allegations in the petition are plainly inadequate to raise a constitutional issue in the respect now asserted on appeal.

Nichols v. Scott, 69 F.3d 1255, 1286 (5th Cir. 1995).

The importance of Ishman's testimony is the "potential [it carries] ... for the destruction of [the observing witness'] identification of [defendant]." *See Lindsey v. King*, 769 F.2d 1034, 1042 (5th Cir. 1985); *see also*, *Kyles v. Whitley*, 514 U.S. 419, 445 (1995) (citing *United States v. Agurs*, 427 U.S. 97, 112-13 n.21 (1976) (finding favorability when one, out of only two, eye-witness impeaches the testimony of the other eye-witness to the crime and that eye-witness is suppressed)). Assuming *arguendo*, that Ishman did not "witness" the murder, she impeaches the State's star witness who was brought forward as an actual eye-witness to the murder. Ishman's testimony, among other things, discredits the State's case by showing that the "star eye-witness" was not a credible eye-witness at all. The importance of this testimony simply "cannot be doubted." *Id.*

IV. Conclusion.

The State's Brief asserts no reason why this Court should not grant review. This case presents important decisions regarding Texas' improper application of federal law. Nichols has been confined to death row for twenty-one years due to the State's suppression of impeachment and exculpatory evidence that was material to Nichols' trials and the State's presentation of knowingly false testimony and information. The numerous erroneous determinations of federal law made by the state habeas court and affirmed by the Texas Court of Criminal Appeals warrant this Court's review.

Joseph Bennard Nichols requests this Court grant review to right a terrible wrong committed by the State nearly a quarter of a century ago.

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